

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case Nos. S-862-B and A-6008

**PETITION OF FEDERATION OF AMERICAN SOCIETIES
FOR EXPERIMENTAL BIOLOGY**

OPINION OF THE BOARD

(Opinion Adopted May 11, 2005)

(Effective Date of Opinion: May 20, 2005)

Case No. S-862-B is an application for a modification to the special exception for an existing Private Educational Institution to permit: 1) Replacement of the Lee Building with a new building (as Phase Two); 2) Construction of an internal circular driveway between the new replacement building and existing parking structure; 3) A Phase Three 40,000 square-foot addition to the new building and an extension of the new parking structure to contain approximately 104 parking spaces; 4) An increase of 78 parking spaces on the Property as part of Phase Three, for a total of 512 spaces; 5) Also as part of Phase Three, an increase in the number of employees on the Property by 120 employees, to a maximum of 700; 6) Leasing of a portion of the special exception space to the Montgomery County Department of Economic Development for a non-profit incubator.

Case No. A-6008 is an application for the following height and setback variances:

The proposed renovation and expansion of the existing garage requires a 1.91 foot variance as it is within 52.25 feet of the side lot line. The required setback is 54.16 feet, in accordance with Section 59-C-1.323(b) (1).

The proposed construction of an accessory structure (4 – level parking garage) requires a 31.92 foot variance as it is within 52.25 feet of the side lot line. The required setback is 84.17 feet, in accordance with Section 59-C-1.326 (a)(2)(C).

The proposed construction of a new building, fifty-seven (57) feet in height requires a twenty-two (22) foot variance from

thirty-five (35) feet height limit, in accordance with Section 59-C-1.327(a)

The two cases were consolidated and heard together.

Pursuant to Section 59-A-4.125 of the Zoning Ordinance, the Hearing Examiner for Montgomery County convened a public hearing on the application on November 19, 2004, and on January 25, 2005, issued a Report and Recommendation for approval of the modification and variance requests.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation together with the annual report from FASEB, dated January 24, 2005, at its Worksession on February 16, 2005. By Resolution of March 17, 2005, the Board remanded the case to the Hearing Examiner for clarification on two issues. First, with respect to the lease of space for a non-profit incubator: How much space will be leased? How many employees are anticipated for the incubator? What is the anticipated traffic impact of the non-profit incubator? Second, the Board notes that the modification application was filed prior to July 1, 2004, when the County Council abolished Policy Area Transportation Review (PATR) in the 2003-2005 Policy Element of the Annual Growth Policy. The Hearing Examiner did not apply PATR standards to the application, and the Board requests that the Hearing Examiner enunciate the relevant case law or legal standard to explain why PATR should not apply.

On April 27, 2005, the Hearing Examiner issued a Supplemental Report addressing the Board's questions, and reiterated his recommendation for approval of the modification, with amendments to the conditions of approval.

The subject property is in Locus Vitae Subdivision; located at 9650 Rockville Pike, Bethesda, Maryland, 20814, in the R-60 Zone.

Decision of the Board: Special Exception Modification and Variances
Granted, Subject to Conditions Enumerated
Below.

Requested Variances **Granted** Subject
To the Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Reports and Recommendations at its Worksession on May 11, 2005. The Board appreciates the thoroughness of each report. After careful consideration and review of the record, the Board adopts the two reports, and the Hearing Examiner's recommendation to grant the requested modification and variances.

THE VARIANCES

Section 59-G-3.1 of the Zoning Ordinance provides that the Board may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

1. *By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property.*

The Board finds that the shape, size and topography of the FASEB Property combined with the history of the use and the existing structures on the Property create an extraordinary situation and condition peculiar to this piece of property that result in practical difficulty for the Applicant in seeking to modify its existing special exception use. In consideration of the shape and topography of the Subject Property and location of the existing structures and natural resources, the Board finds that the desirable solution for the expansion is to position the proposed structures adjacent to the existing administration building on the Property on the improved areas of the site, not to expand on the lawn, wooded areas or slopes on the southern portion of the Property. For the planned buildings to architecturally correspond to the existing building and provide the functionality necessary for FASEB, their heights, measured from the average ground level in front of both buildings, must be 57 feet, exceeding the R-60 zone height limit by 22 feet. [Exhibit No. 3, p. 13.]. The height variance is necessitated by the unusually steep slope of the land where the subject buildings are located. The steep slope changes the average grade so significantly that the height variance is needed even though the new building will be lower than the Lee Building it is replacing [See Exhibit No. 4(c)].

2. *Such a variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions.*

The Board finds that the proposed structures are the minimum necessary to satisfy the functional needs of FASEB for the expansion with respect to office, meeting and administrative space and parking areas. The proposed structures were intentionally positioned on existing impervious areas and adjacent to the existing structures to create the least disturbance to the landscaping, natural resources and slopes on the Property. The structures were designed to be architecturally compatible with the existing structures and will maintain harmony with the general character of the area. Further, the proposed structures will stand lower than the existing building on the Property.

3. *Such a variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property.*

The Board finds that the Master Plan specifically recommends the continuance of the FASEB special exception on the Property because it is a long-term, stable use that is a community resource. Further, the Master plan recognizes that FASEB is one of the special exceptions that might experience needs for expansion.

4. *Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.*

The Board finds that granting the requested variances will not be detrimental to the use and enjoyment of adjoining and neighboring properties primarily because the position and design of the proposed structures creates minimal interruption of the views from adjacent properties. The proposed new building and parking structure are situated on areas of the Property that are currently parking areas, and will therefore maintain the landscaped views and the existing garden, wooded and lawn areas that are enjoyed by the employees and neighbors of the property.

The Board finds that the height of the proposed building and parking structure will be lower than the existing building and screened from the view of the adjacent single-family residential properties due to the natural screen created by the topography and wooded areas of the Property. The existing landscaped border along the edges of the Property will be maintained. The residential elements of the building facade will create an aesthetically pleasing view for visitors to the Property and for travelers along Rockville Pike, although the existing screening along Rockville Pike is extensive.

Therefore, based upon the foregoing, on a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Wendell M. Holloway and Allison Ishihara Fultz, Chair in agreement, and Donna L. Barron necessarily absent, the Board adopts the Reports and Recommendations of the Hearing Examiner and **grants** the requested modification and variances subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in the Hearing Examiner's reports and in the opinion of the Board.
2. All terms and conditions of the approved special exceptions shall remain in full force and effect, except as modified by the Board as a result of these Modification Petitions.

3. Petitioner shall conform with Chapter 50 (Subdivision Regulations) of the County Code.

4. Petitioner shall comply with Local Area Transportation Review requirements, as follows:

a. Limit the development to an expansion of existing office building to an additional 40,000 square feet of office use for a total of 207,312 square feet, that includes a previously approved 50,000 square feet of office.

b. Install three additional bus shelters along northbound Rockville Pike (MD 355) in the vicinity of the campus or other locations in the Bethesda-Chevy Chase area, for a total of four shelters. The three new bus shelters are required to mitigate the additional one and two CLVs in the morning and evening peak hours, respectively, at the intersection of MD 355 and Cedar Lane, which will likely result from the proposed new office space and additional employees during Phase 3. The bus stops on Rockville Pike and other nearby locations should conform to the requirements of the Montgomery County Department of Public Works and Transportation (DPWT).

c. Continue use of the Transportation Management Plan (Exhibit 9(a)).

5. Petitioner shall comply with Chapter 22A (Forest Conservation), as follows:

a. A final Tree Save Plan (FCP) shall be submitted to M-NCPPC prior to DPS approval of the sediment and erosion control plan or any clearing, grading or land disturbance on site.

b. The final Stormwater Management (SWM) and Sediment and Erosion Control plans shall be approved by the Department of Permitting Services, and be consistent with the final Tree Save Plan. Full water quality and quantity control shall be expected to protect the integrity of the Lower Rock Creek watershed.

c. The Tree Save Plan shall address all of the following issues before approval will be granted:

1) A detailed Tree Save Plan shall be prepared by an ISA certified arborist and shall include the delineation and determination of significant impacts (>30%) to the critical root zones of all trees over 24" dbh that will be impacted by construction activities.

2) Mitigation may be required for any specimen trees, if encroachment on the critical root zone of 30% or more is avoidable. Mitigation may be

required for the removal of specimen trees up to a rate of 2:1 on an inch-per-inch basis. Potential planting areas shall be shown on the FCP.

6. Petitioner shall not exceed the 580 employees approved in S-862-A unless and until it has completed construction of the garage extension planned for Phase 3 and opened it for use, in accordance with the waiver of parking standards, hereby approved pursuant to Zoning Ordinance §59-E-4.5, which permits it to have fewer than the number of parking spaces required in §59-E-3.7. After the garage extension becomes operational, Petitioner shall not exceed 700 employees. All caps on the numbers of employees include employees and other staff of the proposed non-profit incubator, as well as Petitioner's own employees and staff.

7. In light of the anticipated increase in the number of FASEB employees, the Transportation Coordinator under the Transportation Management Plan shall report any instances of queuing on public streets awaiting entry to the FASEB campus or reports of parking on public streets by FASEB employees in his/her annual report to the Board of Appeals. If the Board determines that the increase in FASEB employees is creating an adverse condition on the nearby public streets, it may revoke the waiver of parking standards, in whole or in part, or require FASEB to otherwise remedy the problem.

8. All special exception modifications are approved for the normal 24 month statutory period specified in Zoning Ordinance §59-A-4.53(b), with Petitioner retaining the right under Zoning Code §59-A-4.53(c) to seek one year extensions of such approvals, if implementation is not commenced within 24 months after approval.

9. Petitioner must obtain subdivision approval as a condition of the Board's approval of this special exception amendment.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 20th day of May, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

On June 18, 2004, Petitioner, Federation of American Societies for Experimental Biology (FASEB), filed Petition BOA # S-862-B for modification to an existing Private Educational Institution Special Exception, last modified by the Board of Appeals in BOA # S-862-A, on December 28, 2001. Petitioner simultaneously applied for height and setback variances in BOA # A-6008. The Special Exception modification and the Variances are sought to permit Phases 2 and 3 of a construction project that was begun on the FASEB campus pursuant to Special Exception S-682-A and Variance A-5599. The construction includes replacement of the existing Lee administrative building and enlargement of other structures, including a garage. The subject site is located at 9650 Wisconsin Avenue (a/k/a Rockville Pike and MD Route 355), Bethesda, on an 11.2 acre site, which is zoned R-60.

On August 4, 2004, the Board noticed a consolidated hearing in S-682-A and A-6008 for November 19, 2004, at 9:30 a.m., in the Stella B. Werner Council Office Building (Exhibit 14(b)).¹ By letter dated October 19, 2004 (Exhibit 15), Petitioner filed a motion to amend the Petition to seek permission for FASEB to lease a portion of its space to the Montgomery County Department of Economic Development so that a non-profit incubator² could be located on site (Exhibit 15). That motion was noticed on October 21, 2004 (Exhibit 16). Given that no opposition was filed by the notice return date of November 1, 2004, that motion to amend the Petition was granted. Tr. 4.

On November 5, 2004, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 18),³ which recommended approval of the Modification Petitions, with conditions. On November 9, 2004, the Planning Board unanimously recommended approval, with conditions similar to those suggested by Technical Staff (Exhibit 18(a)).

Letters of support for the Petitioner were filed by Allen L. Myers, President of the Maple-wood Citizens Association (Exhibit 12), Nicole Chapin Duke, President of the Locust Hill Citizens Association (Exhibit 29) and Douglas M. Duncan, Montgomery County Executive (Exhibit 19).

The Hearing went forward as scheduled on November 19, 2004, and was completed on the same date, with the record held open until November 29, 2004, to receive Petitioner's brief on the propriety of a variance in this case (Exhibit 30(a)). No opposition witnesses appeared at the Hearing; however, a representative of the Montgomery County Department of Economic Development testified in support of the Petition and Martin Klauber, the People's Counsel, also strongly supported the Petition.

On December 23, 2004, Petitioner, by letter (Exhibit 31), requested that the record in this matter be reopened to allow filing of Petitioner's request for a waiver

¹ References to exhibit numbers refer to the Special Exception file (S-682-B) unless noted otherwise. All exhibits received during and after the hearing are listed in that file, although they may pertain to both the special exception and the variance requests.

² The term "non-profit incubator" refers to the location of non-profit organizations on the FASEB campus in "a shared use environment" to reduce their costs and assist in their development. Exhibit 19.

³ The Technical Staff Report, Exhibit 18, is frequently quoted and paraphrased herein.

of parking standards pursuant to Section 59-E-4.5 of the Zoning Ordinance. Petitioner seeks to have the authorized number of employees raised to 700, which will exceed the number of parking spaces (512) planned for the FASEB campus. The Hearing Examiner reopened the record for 30 days, until January 24, 2005, to receive the parking waiver request and public comment. Notice was sent to all adjoining property owners and affected citizen associations, but no further comment was received.

The appropriate scope of the hearing on a petition for modification of a special exception is spelled out in Zoning Code § 59-G-1.3(c)(4). That subsection provides:

(4) The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. Decisions of the Board to amend or modify the terms or conditions of a special exception must be by the affirmative vote of at least 4 members as indicated by the adoption of a written resolution reflecting its decision, opinion and order.

Petitioner's plans include expansion of the total floor area by 40,000 square feet, plus the enlargement of the existing garage. Exhibit 3. Thus, Petitioner's plans greatly exceed the statutory threshold of 7500 square feet. Moreover, the expansion, when considered in combination with the underlying special exception, may have substantial effects on the surrounding neighborhood unless properly handled with a traffic management plan and appropriate screening. Accordingly, the scope of this inquiry does include a review of the "underlying special exception," and is not limited by statute to "discussion of those aspects of the special exception use that are directly related to [the modification] proposals." As will be shown below, Petitioner has demonstrated compliance with all the statutory requirements, and its traffic management plan, screening and other proposals will successfully avoid any adverse effects on the community.

II. FACTUAL BACKGROUND

A. Description of FASEB

FASEB's background and function are succinctly described in Petitioner's Statement in Support of Modification and Variances, Exhibit 3, page 2:

Founded in 1912 by three scientific societies, FASEB is an organization of independent Member Societies that serves the interests of biomedical and life scientists, particularly those related to public policy issues, by facilitating coalition activities among Member Societies and disseminating information on biological research through educational meetings and numerous publications. FASEB also offers Member Societies headquarter facilities and logistic support for their day-to-day operations. The mission of FASEB is to enhance the ability of biomedical and life scientists to improve, through their research, the health, well-being, and productivity of all people. FASEB currently consists of 21 Member Societies and represents over 60,000 life scientists.

The FASEB headquarters has operated on the Property since 1954 and has been granted special exceptions both as a scientific society and, when that category was eliminated from the Zoning Ordinance, as a private educational institution. The headquarters of the Society is for education and administration. No laboratory experimentation is conducted on-site and, although there is a small print shop, there is no major printing on-site. Although annual meetings and large conferences are planned at headquarters, none are held on the Property. There are occasional conferences of member societies, committees and boards which would attract a maximum of 100 participants, nearly all from out of town and do not use on-site parking. There are approximately 330 employees on the FASEB campus currently,

and 580 employees are permitted pursuant to the existing special exception approvals.

B. The Subject Property and Surrounding Neighborhood

The subject property is located at 9650 Wisconsin Avenue, just south of the Capital Beltway. Since Wisconsin Avenue in that area is more commonly referred to as Rockville Pike or MD Route 355 on the maps in this record, that nomenclature will be used in this report. The subdivision in which FASEB is located was recorded in September 2002, with the name, "Locus Vitae," which translates to "The Place of Life." Tr. 27-28. That is the name shown most prominently on both the Vicinity Map from the Technical Staff report and an aerial photo (Exhibit 20), both of which are shown below. As is apparent from these maps, the FASEB campus is on the west side of Rockville Pike, just north of AltaVista Road in Bethesda.

FASEB - SPECIAL EXCEPTION CASE NO. S-862-B



Existing Parking
Garage Added
in Phase 1

“E” Shaped Lee Bldg
which will be
Replaced in Phase 2

Existing 50,000 sq. ft.
Bldg Added in Phase 1



As can be seen from the aerial photo, the southern portion of the property is extensively landscaped with numerous trees, shrubs and plantings. All of the construction which is the subject of this case will occur in the structures along the northern property line of the subject site. There are two entrances on Rockville

Pike and a secondary “limited use” entrance on Alta Vista Terrace. The Property is served by internal private roadways and has approximately 434 parking spaces.

According to Technical Staff, the property was formerly a residential estate, and it is approximately 11.2 acres in size and irregular in shape. A 25 foot PEPCO easement encumbers the entire length of the north side of the property. Among the structures currently on the property is the “E” shaped, Lee building, a 4.5 story brick and stone administration building (approximately 103,000 sq. ft.) which was the subject of the original 1954 special exception. Tr. 11. As will be discussed below, Petitioner plans to replace the Lee building as part of Phase 2 in its project. To the east of the Lee Building, and connected to it, is the 50,000 sq. ft. building recently constructed pursuant to Special Exception modification S-862-A. To the west of the Lee Building is a 217 car garage which was also added pursuant to S-862-A. A storage barn is located west of the parking garage, a single-story framed residence is south of the main line of buildings, and there are two other small stone buildings on the site.

There is a steep slope downward (42 foot drop-off) towards Rockville Pike, which makes the topography of the subject property unique from its surrounding neighbors. Tr. 83-84. As can be seen from the aerial photo, the size and shape of Petitioner’s lot also differs markedly from the surrounding properties.

The subject property is in the R-60 zone. Technical Staff defined the neighborhood as including properties bordered by Pooks Hill Road and Linden Avenue to the north and west, and Elsmere Avenue to the south, including the Maplewood Estates subdivision. To that the Hearing Examiner would add the neighborhood across Rockville Pike, due east of the subject property, which is composed of single family detached homes in the Locust Hill Estates subdivision. Single-family detached homes and multifamily condominium apartments surround the property. As stated by Technical Staff, the surrounding neighborhood is predominantly residential in character, zoned R-60 to the west, south and east. Single-family homes are located south and west of the property in the Maplewood Estates subdivision. Further to the west is the Maplewood Alta-Vista Park. To the north, the property is adjacent to the Bethesda Hill Apartments (Condominiums) and the Pooks Hill Towers, both in the R-H zone. The Pooks Hill Marriot and the Promenade Apartments are located in the H-M and R-H zones respectively and north of the property. As mentioned, east of the subject property, across Rockville Pike, is the Locust Hill Estates subdivision, which is composed of single family detached homes in the R-60 Zone.

C. The Master Plan

The subject property is within the *1990 Bethesda-Chevy Chase Master Plan* area. Technical Staff references the Master Plan’s “Areawide Land Use Guidelines” (pp. 29-30), which discusses, in general, how to evaluate the compatibility of each parcel. However, the most salient fact about the Master Plan, as it relates to the subject Petition, is that the Master Plan expressly calls for: “[r]esidential zoning and continuation of the existing use . . . for the . . . Federation of American Societies for Experimental Biology” and certain other properties. Page 33. The Master Plan specifically recommends that FASEB should continue the existing use because “. . . long-term, stable uses . . . [are] viewed as community resources.”

Remarkably, the Master Plan even recognizes that “new development on these sites will also require amendment to existing special exception conditions to protect the setting of the use and to maintain compatibility with nearby properties.” Page 33. New conditions are recommended in this report both with regard to transportation and the environment, as a result of the new development. Moreover, because the new construction being proposed remains in the same area previously occupied by similar structures, and the new structures will actually be shorter than the current Lee administrative building and well buffered from surrounding properties, the Hearing Examiner finds that there will be minimal, if any, impact on compatibility.

Finally, it should be noted that the Master Plan advocates supporting special exception uses “that contribute to the service and health objectives of the Master Plan.” As is evident from the nature of the FASEB operation and the description of benefits contained in the County Executive’s letter in support of this Petition (Exhibit 19), as well as the testimony of Hafiza Haleem, of the Department of Economic Development (Tr. 21-22), Petitioner would be a great contributor to service and health objectives for the County.

It is certainly fair to say that the proposed Modification Petition is consistent with the applicable Master Plan.

D. Proposed Modifications

The subject Modification Petition, S-862-B, seeks authorization to complete Phases Two and Three of FASEB’s campus reconstruction project that was begun pursuant to the Board’s grant of S-682-A and A-5599 in December of 2001 (Exhibit 11). Following that ruling, Petitioner constructed a 50,000 square foot building expansion on the east side of the existing administration (Lee) building, adjacent to Rockville Pike, an atrium area which connects the two buildings and provides an entranceway for the entire facility, and a four-story, 220-space, parking structure along the west side of the existing administration building. The building and garage are now standing and occupied. FASEB currently has approximately 330 employees who work on the property, although the Board’s Opinion in S-862-A permitted an additional 250 employees, bringing the authorized total to 580. There are 434 parking spaces, including those outside the garage.

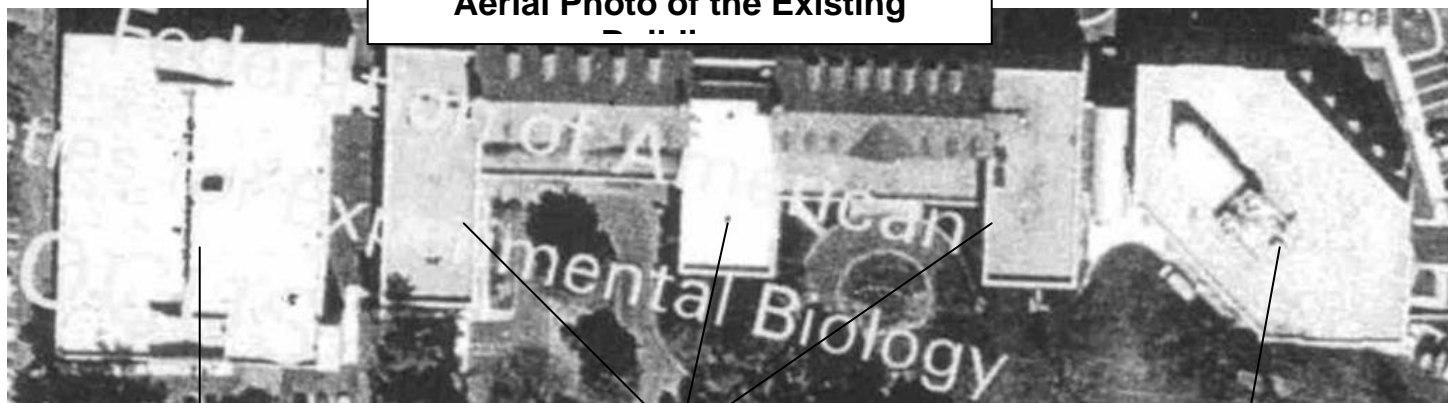
Phases 2 and 3 are the subject of the current Petition. During Phase 2, a 103,000 sq. ft. building will be constructed to replace the existing, “E” shaped, Lee Administrative Building. The new building will accommodate approximately 250 employees and will occupy a smaller footprint than the Lee Building, allowing construction of a circular driveway between the replacement building and the garage. Its administrative function will be unchanged. The new building will be both functionally and architecturally the same as the recently constructed Phase 1 building on Rockville Pike. While it is five stories in height, the new Phase 2 building will be approximately eight feet lower than the height of the Lee Building it is replacing. The building that replaces the Lee Building will be 12 feet higher than the existing Phase 1 building because it sits on a higher grade. The five-story structure will be screened from view of adjoining properties by topography and natural features, including many trees on the site. The existing atrium will connect the buildings, and it will serve as the main entrance for the entire facility, connecting the buildings visually.

During Phase 3, a 40,000 sq. ft. extension of the building and a 104-space extension of the existing parking garage will be constructed. The 40,000 sq. ft. extension will accommodate 120 additional employees, and the 104-space parking garage extension will accommodate 78 additional vehicles after the removal of some surface parking. This will bring the total number of permitted employees to 700, and parking spaces on the property to 512 spaces. The utilization of the Phase 3 building will be functionally the same as the existing Phase 1 and proposed Phase 2 buildings, and likewise it will be architecturally similar to the existing buildings.

The amended petition would also permit FASEB to lease a portion of its space to the Montgomery County Department of Economic Development to serve as an on-site incubator for non-profit organizations. This activity would not change the overall density, site plan or number of employees.

To better understand both the existing layout and the proposed development, the first picture displayed below is the portion of the aerial photo (Exhibit 20) showing the existing buildings. Below it are corresponding diagrams from Exhibit 4(c), showing both the existing and proposed buildings:

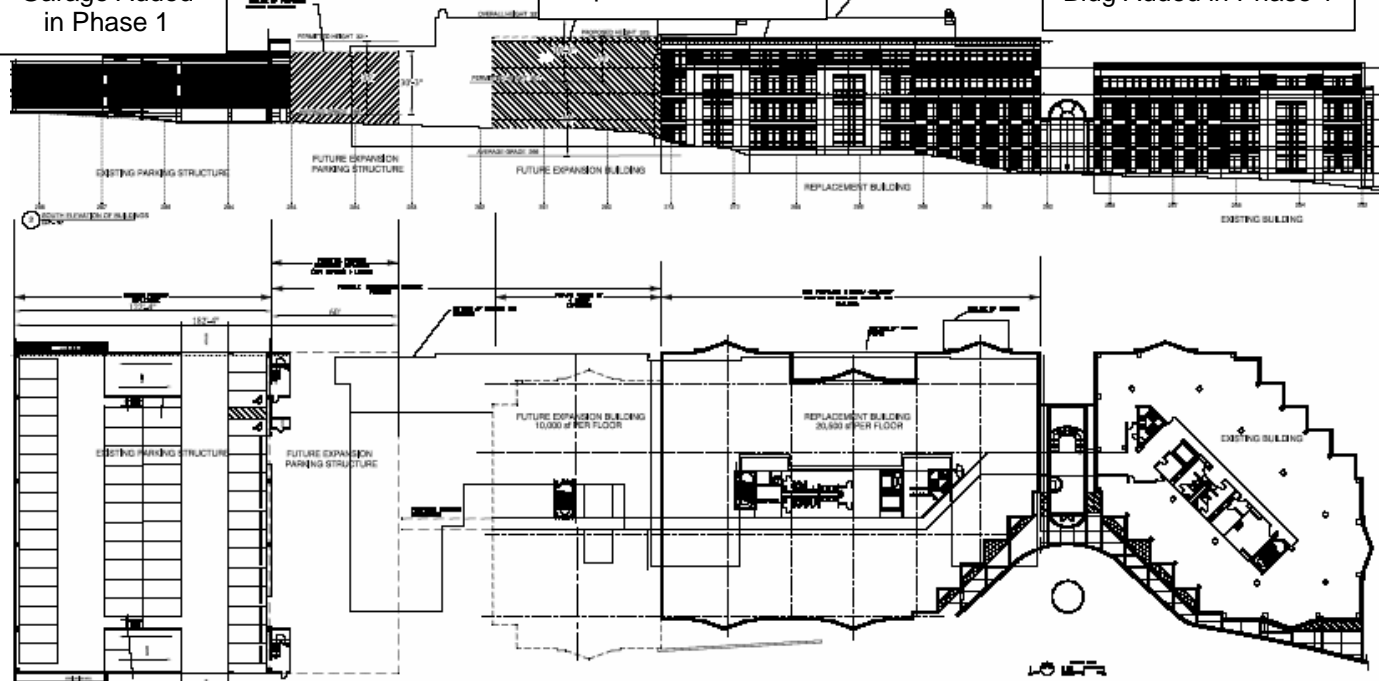
Aerial Photo of the Existing

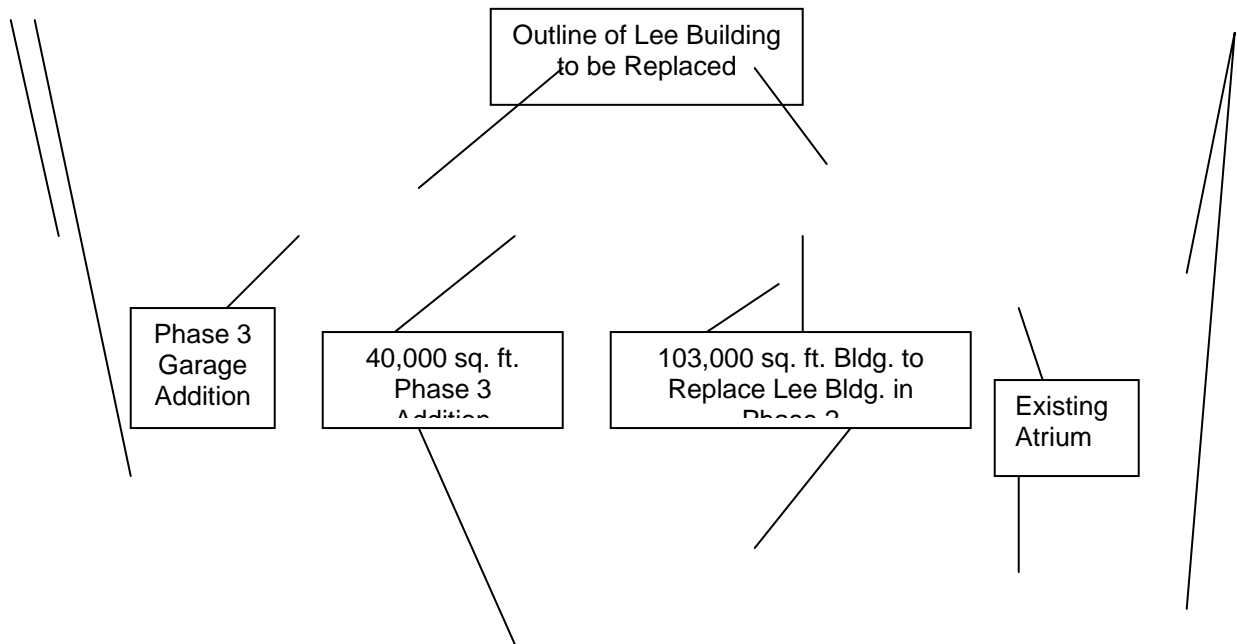


Existing Parking
Garage Added
in Phase 1

"E" Shaped Lee Bldg
which will be
Replaced in Phase 2

Existing 50,000 sq. ft.
Bldg Added in Phase 1





Layout of Existing and Proposed

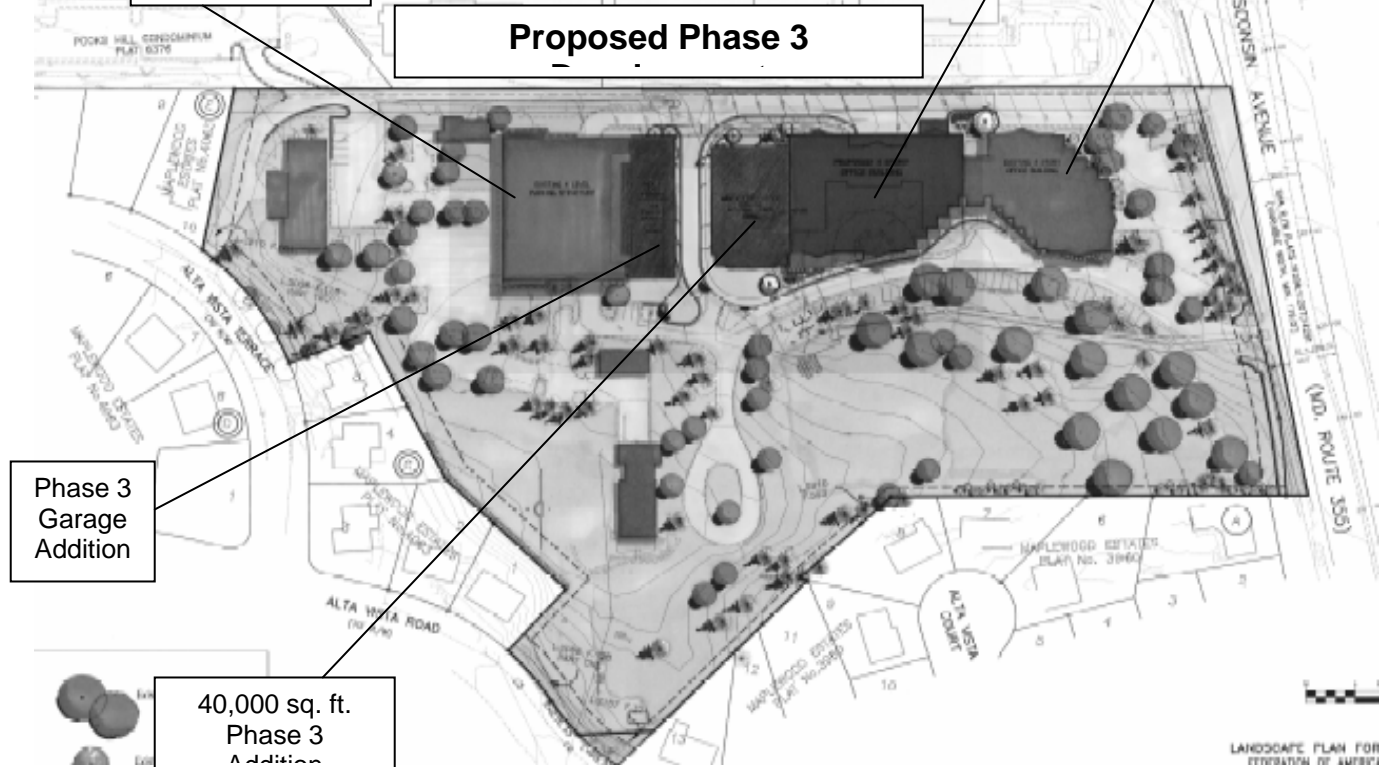
The following diagrams are reproduced from the rendered version of the Landscape Plan (Exhibit 23), the first showing the proposed Phase 2 development and the second, the proposed Phase 3 development:

In sum, Petitioner 1) Replacement (in Phase 2) building, similar to the

Proposed Phase 2



Proposed Phase 3



design and architecture of the Phase One building (constructed pursuant to Case No. S-862-A), but with a smaller footprint than the Lee Building it is replacing;

2) Construction in Phase 2 of an internal circular driveway between the new replacement building and existing parking structure, which is possible because the replacement building has a smaller footprint. The same number of parking spaces (434) will be maintained on the Property in Phase 2;

3) Construction in Phase 3 of a 40,000 square-foot addition to the Phase 2 building and an extension of the new parking structure, adding approximately 104 parking spaces;

4) As part of Phase 3, an increase of 78 parking spaces on the Property for a total of 512 spaces;

5) Also as part of Phase 3, an increase in the number of employees authorized on the Property by 120 employees, bringing the total authorized to a maximum of 700.

6) To lease a portion of its space to the Montgomery County Department of Economic Development to serve as an on-site incubator for non-profit organizations.

The following chart from Technical Staff's report shows the planned development:

Table 1 – FASEB Proposed Development Plans Phase 2 & 3

	Buildings	Parking	Employees Authorized
Existing Development	167,312 sq. ft.	217 – parking garage <u>217 – on-site¹</u> 434 total	580
Phase 2 Proposal	103,000 sq. ft. (Replaces Existing)	<i>No Change</i>	<i>No Change</i>
Phase 3 Proposal	40,000 sq. ft. extension of Phase 2 building	104 new spaces in extended parking garage (78 net total gain)	120
Total	207,312 sq. ft.	512	700

1. 18 spaces beneath the new 50,000 sq. ft.

Petitioner indicates, on page 4 of Exhibit 3 that, pursuant to Section 59-A-4.53(b) of the Montgomery County Code, the Petitioner will implement the proposed modification within 24 months of the Board's approval, with the construction of the Phase 2 building, which replaces the existing Lee Building. As to Phase 3, Petitioner states that it "is part of the FASEB master plan for site improvements on the Property and will be implemented within 12 years of the special exception modification approval." Petitioner notes that the period of 12 years "is consistent with the time permitted pursuant to Section 50-20(c)(3)(iii) of the Montgomery County Code that the Planning Board may approve the validity of

the preliminary plan amendment, which amendment the Petitioner will seek subsequent to the special exception modification approval for the 40,000 square foot addition proposed with Phase 3 of the request.” Petitioner raised the same issue during the hearing. FASEB’s facilities manager, Jeffrey L. Yocum, testified that Petitioner is requesting the 12 years to complete the Phase Three portion of the modification. Tr. 54-55.

Petitioner’s counsel, Anne Martin, then explained that Phase Three was a long term plan, and it was tied to a 12 year period that approvals by the Planning Board last under the Adequate Public Facilities Ordinance. Ms. Martin felt that if the current Petition is approved and work begins on Phase Two within two years, implementation of Phase Three could await the 12 year period without yearly requests for extensions following the initial 2 year period. The People’s Counsel disagreed, and indicated that Petitioner would have to get extensions from the Board of Appeals if Phase 3 did not begin within 2 years. Tr. 56- 61.

Under Zoning Ordinance §59-A-4.53(b), a special exception is not valid after 24 months “if the use is not established or a building permit is not obtained and construction started within the period.” Extensions are available under Zoning Code §59-A-4.53(c) for only 12 months at a time. The statutory language is not clear in a situation like the subject case, where construction will begin on one phase of a project within 2 years, but another phase may take longer to begin. On the one hand, it is in the public interest for a Petitioner to lay out its long term building plans for the Board when it applies for a special exception or a modification. On the other hand, a twelve year approval would tie the Board’s hands for a substantial period of time, and changes in the neighborhood or in public policy could make such long term approvals unwise. While FASEB is undoubtedly a dependable and considerate neighbor, such a rule interpretation would have to be applied to all petitioners, and that might create unnecessary risks in other cases.

Because of this concern, the Hearing Examiner cannot recommend Petitioner’s interpretation on this point to the Board. If the Phase 3 special exception modifications Petitioner seeks here are granted, and the Zoning Ordinance is not amended, Petitioner should be required to seek extensions of the approval for Phase 3, assuming it is not commenced within 24 months after approval.

E. The Environment, Landscaping and Lighting

According to Technical Staff, Petitioner has an approved Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) that was submitted with the application, and M-NCPPC’s Environmental Planning Division granted Petitioner an exemption from the Forest Conservation Requirements of Chapter 22A (Exhibit 10). There are no wetlands or other environmentally sensitive areas that exist on the property.

The new Phase 2 building will be constructed over the location of an existing building, which will greatly reduce the potential impact on existing green areas. The future Phase-3-extension of the Phase 2 building, and the parking structure extension, will both take place over the existing parking, planting areas and drive aisles. However, a few large pine trees will be removed from these

areas, and Environmental Planning Staff recommended a number of conditions to insure compliance with Chapter 22A (Forest Conservation), which were also incorporated into the Planning Board's recommendation. They are set forth below and are included in the conditions recommended by the Hearing Examiner at the end of this report:⁴

- a. A final Tree Save Plan (FCP) shall be submitted to M-NCPPC prior to DPS approval of the sediment and erosion control plan or any clearing, grading or land disturbance on site.
- b. The final SWM and Sediment and Erosion Control plans shall be approved by the Department of Permitting Services, and be consistent with the final Tree Save Plan.
- c. The Tree Save Plan shall address all of the following issues before approval will be granted:
 - 1) A detailed Tree Save Plan shall be prepared by an ISA certified arborist and shall include the delineation and determination of significant impacts (>30%) to the critical root zones of all trees over 24" dbh that will be impacted by construction activities.
 - 2) Mitigation may be required for any specimen trees, if encroachment on the critical root zone of 30% or more is avoidable. Mitigation may be required for the removal of specimen trees up to a rate of 2:1 on an inch-per-inch basis. Potential planting areas shall be shown on the FCP.
- d. As to Stormwater Management, full water quality and quantity control shall be expected to protect the integrity of the Lower Rock Creek watershed.

As to Landscaping, Petitioner has submitted Plans for both Phase 2 and Phase 3 (Exhibits 5(a) and (b)), and rendered versions of those exhibits, as depicted in Exhibit 23, are reproduced above on page 14 of this report. Technical Staff notes that there is a significant amount of landscaped buffer (a row of tall pines which can be seen on the aerial photo on page 8 of this report) between the proposed use and the neighboring properties to the north, thereby effectively screening any light or noise from traffic or the buildings. The large green area which occupies the southern half of the campus, in combination with the sloping terrain and the landscaping insulates the single family residents to the south and west.

Moreover, the proposed new replacement building will have a reduced visibility compared to the existing Lee building because it is approximately eight feet shorter than the existing building. According to Technical Staff, very little of

⁴ The Hearing Examiner added a condition regarding water quality which was mentioned in the Environmental Planning Staff's report, but not listed in that report as a specific condition.

the proposed structures will be visible from the adjacent properties, and the mass of the buildings is mitigated by diagonal elements and angles of the structures. The parking structure also uses architectural elements to reduce its impact.

The new construction should have minimal impact on the landscaping because all of the proposed development will take place in areas that are already covered with buildings or paved for parking or circulation. Technical Staff also states that the proposed lighting is consistent with the existing lighting previously approved by the Board in Case No. S-862-A. It should be noted that additional lighting will be added in the area where the new circular drive cuts between the new buildings and the garage (See diagram on page 14 of this report); however, photometric studies have shown that the lighting produced does not exceed 0.1 footcandle at the property line. Exhibits 5(c) and (d).

F. Traffic Management and Safety

1. Local Area Transportation Review (LATR)

Petitioner's proposals to substantially expand the number of employees and parking will clearly have some impact on traffic in the area. The first question which ordinarily must be answered at this stage is whether the traffic impact will be sizable enough to exceed Local Area Transportation Review (LATR) standards. To answer this question, Petitioner provided a traffic study (Exhibit 9(b)) and testimony by Kevin D. Sitzman, an expert in traffic engineering and transportation planning.

Mr. Sitzman testified that because Phase 2 is essentially a building replacement, "[i]t would generate no new trips . . ." Tr. 121. As to the impact of Phase 3, eight intersections were studied by Mr. Sitzman, and he concluded that only the intersection at Cedar Lane and Maryland Route 355 (Rockville Pike) exceeded the applicable critical lane volume (clv) standard of 1650.⁵ As shown in the chart on page 17 of his study, the clv at that intersection for existing traffic is 1,722 in the a.m. peak hour and 1,717 in the p.m. peak hour. When background traffic (*i.e.*, including other developments in the pipeline) is added in, the a.m. peak hour has a clv of 1,729 and the p.m. peak hour has a clv of 1,724. When the additional traffic which is anticipated from Phase 3 is added in, a single additional clv unit would be added to the background level in the morning (raising the a.m. peak hour clv to 1,730), and two clv units would be added in the evening (raising the p.m. peak hour clv to 1,726).

In order to mitigate these anticipated clv increases, Transportation Planning Staff recommended certain conditions, which were adopted by the Planning Board. They are set forth below and included in the Hearing Examiner's recommended conditions at the end of this report.

- a. Limit the development to an expansion of existing office building to an additional 40,000 square feet of office use for a

⁵ Both the Petitioner's expert and the Transportation Planning Staff applied the CLV standards in effect prior to July 1, 2004, because the Petition was filed prior to that date. The current clv standard for the one non-compliant intersection is 1600 clv; however, because recommended traffic mitigation measures will reduce the projected clv at the intersection to at or below the level before the new construction, it is immaterial which standard is applied.

total of 207,312 square feet that includes a previously approved 50,000 square feet of office.

- b. Install three additional bus shelters along northbound Rockville Pike (MD 355) in the vicinity of the campus or other locations in the Bethesda-Chevy Chase area for a total of four shelters. One of the shelters was conditioned for the 50,000 square feet of new office building proposed in petition #S-862-A. Three new bus shelters are required to mitigate the additional one and two CLVs in the morning and evening peak hours, respectively, at the intersection of MD 355 and Cedar Lane resulting from the proposed new office buildings on campus. The bus stops on Rockville Pike and other nearby locations should conform to the requirements of the Montgomery County Department of Public Works and Transportation (DPWT).

Petitioner has agreed to taking these steps, and Mr. Sitzman testified that, for Phase 3, “the expansion and the proposed mitigation measures, would result in critical lane volumes identical to the background levels, fully mitigating the site impacts and satisfying the local area transportation review guidelines.” Tr. 121. Transportation Planning Staff agreed. Therefore, the Hearing Examiner concludes that LATR has been satisfied.

2. Policy Area Transportation Review (PATR)

Because this Petition was filed prior to July 1, 2004, Technical Staff applied the Policy Area Transportation Review (PATR) which was abolished effective July 1, 2004, by the Council's 2003-2005 Policy Element of the Annual Growth Policy. In doing so, Technical Staff noted that the Bethesda-Chevy Chase policy area has a remaining staging ceiling capacity of 57 jobs as of June 30, 2004. Since Petitioner is seeking permission to generate 120 additional jobs on site, that plan would run afoul of PATR, absent any mitigation measures. Mr. Sitzman testified that the appropriate staging ceiling is 390 jobs because that was the figure in effect prior to the filing date of this Petition on June 18, 2004. Tr. 124.

Whichever figure is correct, it is apparent that Transportation Planning Staff was satisfied that the mitigation measures they recommended would be sufficient because they recommended approval subject to those conditions. Petitioner's counsel indicated that Transportation Planning Staff applied mitigation standards applicable “to both scenarios.” Tr. 107. There is no evidence in the record to the contrary. Moreover, given the Council's abolition of PATR as of July 1, 2004, the Hearing Examiner does not believe it makes sense to deny an unopposed project which provides considerable community benefit, based on standards that have not been in effect for five months, especially in light of the favorable recommendations from Technical Staff and the Planning Board.

3. Transportation Management Plan

Pursuant to Condition 3.e. of the Board of Appeals Opinion in S-862-A, Petitioner implemented a Transportation Management Plan (Exhibit 9(a) and Tr. 46), which will remain in effect and be updated to maximize the safety and

efficiency of traffic, while minimizing any adverse impacts on neighbors. Tr. 47. Among other things, that Plan encourages “staggered [work] hours, teleworking, telecommuting, carpooling and public transportation” to reduce the level of traffic. In addition, Petitioner will be adding three new bus shelters (in addition to the one FASEB installed already), in accordance with the traffic mitigation recommendations of Transportation Planning Staff. Tr. 46-47. Petitioner will also add a driveway between the new buildings and the garage, which will improve circulation, and will add additional turn around space so that trucks can access the loading dock near the northern property line with greater safety. Tr. 48. Annual reporting by the Transportation Coordinator to the Board of Appeals will continue. Tr. 53.

4. Request for a Parking Waiver

There are currently 434 parking spaces on the campus, 217 of which are located in the 4 level garage which was constructed as part of Phase 1. During Phase 3, a 104 parking space extension will be added to the existing 4-story garage. Since that extension will cause the loss of 26 surface parking spaces, the net gain will be 78 additional parking spaces, bringing the campus total up to 512 spaces (434 + 78). Zoning Ordinance §59-E-3.7 requires that private educational institutions provide “[o]ne parking space for each employee, including teachers and administrators, plus sufficient off-street parking space for the safe and convenient loading and unloading of students, plus additional spaces for all student parking.” Because Petitioner’s plans call for a maximum of 700 employees in Phase 3 (and no students), the proposed parking total of 512 spaces falls 188 spaces short of the one-to-one parking space requirements of Zoning Ordinance §59-E-3.7. Therefore, Petitioner has requested a waiver of the parking standards, which the Board of Appeals is authorized to award pursuant to Code §59-E-4.5, if the evidence demonstrates that the addition of the 188 spaces is not necessary to accomplish the objectives in Code §59-E-4.2.

That section provides:

Sec. 59-E-4.2. Parking facilities plan objectives.

A parking facility plan shall accomplish the following objectives:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.*
- (b) The safety of pedestrians and motorists within a parking facility.*

(c)The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.

(d)The provision of appropriate lighting, if the parking is to be used after dark.

Technical Staff concluded that the proposed parking meets the parking facilities plan objectives of Section 59-E-4.2, for the following reasons:

Adjacent properties are reasonably protected from automobile noise, glare, lights, parking lot lighting and automobile fumes because of the topography of the site (sloping towards Rockville Pike), and the extensive landscaping and trees that exist on the site. Pedestrians and motorists will be able to access the building safely from the parking garage or the outdoor parking areas because there are sufficient drive aisle widths on the property, as well as current and planned sidewalks. Motorists will be able to maneuver onto the site and exit the site safely, and the existing gated entrance at the rear of the property will limit the number of vehicles that can enter and exit the property from Alta Vista Terrace. Finally, FASEB will not typically operate after daylight hours; however, lighting is proposed for the parking areas, and it will be consistent with existing lighting on the property that is angled down to reduce glare while providing safety for pedestrians.

In addition to Technical Staff's observation, the Hearing Examiner notes that there is uncontroverted testimony at the hearing that during the peak hours of occupation on campus, a large portion of the parking spaces on the FASEB campus (197 of 434) were found to be vacant during a recent survey (taken in October of 2004). Tr. 44-45. This probably results from the fact that FASEB has a peak hour trip generation rate that is 35-38 percent lower than a typical office building in similar areas of the County. Tr. 120. It does not make sense to require Petitioner to construct more parking spaces than it needs because it would result, not only in unnecessary expense to Petitioner, but also the creation of additional impervious areas on the FASEB campus.

Based on the evidence that Petitioner can accomplish the objectives set forth in §59-E-4.2 with 512 parking spaces, the Hearing Examiner recommends granting the requested waiver.

G. Community Concerns

There has been no community opposition to the proposed modifications. Letters of support for the Petitioner were filed by Allen L. Myers, President of the Maplewood Citizens Association (Exhibit 12), Nicole Chapin Duke, President of the Locust Hill Citizens Association (Exhibit 29) and Douglas M. Duncan, Montgomery County Executive (Exhibit 19).

Mr. Duncan's letter extols the virtues of FASEB, describing it as "one of the most highly-recognized life and bioscience organizations in the nation." The County Executive supports both the proposed expansion and FASEB's plan to make a portion of its space available as an incubator for other non-profit organizations, in coordination with the County's Department of Economic Development. Testimony

in support of this project was provided by Hafiza Haleem of the Department of Economic Development. Tr. 20-24.

When the Hearing Examiner raised the question as to whether there had been any complaint about the subject proposals from the residents of the closest community, Bethesda Hill Condominium, the People's Counsel noted that, "This petitioner has gone far and above what is reasonable in contacting its immediate neighbors and there has been no response . . ." Tr. 16. The People's Counsel summed up its own position by saying that "the office of the People's Counsel, unequivocally, and without reservation, is so very pleased to support the expansion of FASEB that you will hear in detail about today. Mr. Yocum especially, and Dr. Rickles have been so forthcoming with the neighbors, all the neighbors and the office that I represent, that they truly reflect an institute whose existence and continuance is in the public interest of Montgomery County as a whole." Tr. 18.

H. The Request for Variances

Petitioner's request for a special exception modification to allow reconstruction of the FASEB Campus cannot be granted unless Petitioner is also granted the area variances⁶ it has requested, since absent the requested variances, the proposed Site Plans for Phases 2 and 3 (Exhibits 4(a) and (b)) would both violate the development standards of the R-60 Zone with regard to height and side-yard setbacks. The Maryland Court of Appeals has held that if an applicant can satisfy all the requirements for obtaining area variances, a Board of Appeals has authority to grant area variances "that enable[] [the applicant] . . . to satisfy the criteria for the granting of a special exception." *Alviani v. Dixon*, 365 Md. 95, 117, 775 A. 2d 1234, 1247 (2001). Accordingly, the next question is whether the Petitioner meets the criteria for the area variances it seeks.

The statutory criteria for obtaining an area variance in Montgomery County are set forth in Zoning Ordinance §59-G-3.1:

Sec. 59-G-3.1. Authority-Board of Appeals.

The board of appeals may grant petitions for variances as authorized in section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

(a) *By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;*

(b) *Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;*

(c) *Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or*

⁶ The variances in question are "area" variances, as distinguished from "use" variances because they relate to dimensional restrictions (*i.e.*, height and setbacks) rather than the nature of the use intended for the property.

any duly adopted and approved area master plan affecting the subject property; and

(d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the board, under the guise of a variance, to authorize a use of land not otherwise permitted.

(e) Any allegation of error or any appeal from any action, inaction, order or decisions pertaining to calculation of building height or approved floor area ratio (FAR) standard shall be considered according to the provisions governing appeals for a variance (section 59-G-3.1), rather than as an administrative appeal (section 59-A-4.11(c)).

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The courts have applied these standards, and similar ones from other Maryland jurisdictions, to approve both height and setback variances. See, e.g., *Loyola Federal Savings & Loan Ass'n v. Buschman*, 227 Md. 243, 176 A.2d 355 (1961) and *McLean v. Soley*, 270 Md. 208, 310 A.2d 783 (1973). However, the courts have also made clear that both uniqueness of the property and practical difficulties absent the variance must be shown to obtain an area variance. *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995).

In the subject case, both the proposed Phase 2 building and the Phase 3 building expansion will require a 22 foot height variance from the 35 foot height limit under Zoning Code §59-C-1.327(a). The parking structure will require two different sideyard setback variances. The first variance of 1.92 feet occurs in Phase 2 even though the garage will not be enlarged in Phase 2, because the garage will become an accessory structure, by definition, once it is detached from the existing building. Under Zoning Code §59-C-1.326(a)(2)(C)(4), an accessory building's sideyard setback (*i.e.*, the required distance of the garage from the northern property line) is five (5) feet, plus the amount determined by the following language:

(4) For any accessory building or structure in the[R-60] zone[] . . . with a length along a rear or side property line which has a linear dimension greater than 24 feet, the minimum setback from that rear or side property line must be increased from the requirement in (2) above at a ratio of one foot for every 2 feet that the dimension exceeds 24 linear feet.

Since the garage is 122 feet 4 inches in length (Tr. 86; Exhibit 4(c)), it exceeds 24 feet by 98.33 feet (122.33 feet – 24 feet = 98.33 feet). Applying the

statutory language, the setback is determined by adding one foot for every two feet of excess over 24 feet, we divide 98.33 by 2, yielding a result of 49.165 feet. Adding that result to the base accessory building setback of 5 feet, yields the required Phase 2 sideyard setback for the garage of 54.165 feet. The actual distance of the garage from the northern property line is 52 feet 3 inches (*i.e.*, 52.25 feet). Subtracting the actual setback of 52.25 feet from the required setback of 54.165 feet yields a shortfall of 1.915 feet ($54.165 - 52.25 = 1.915$). Rounding off, Petitioner needs a 1.92 foot sideyard setback variance in Phase 2.

In Phase 3, the garage length will be expanded by 60 feet (Exhibit 4(c)). Applying the same statutory provision means that one foot will have to be added to the required setback for every extra two feet of garage length added. Thus, the required setback will grow by 30 feet, from 54.165 feet to 84.165 feet. Since we know that the actual setback will not change from 52.25 feet, the shortfall in Phase 3 will be 31.915 feet. Rounding off, Petitioner seeks a 31.92 foot side yard setback variance in Phase 3.

We now turn to the question of whether the evidence justifies the requested variances under the applicable statutory standards.

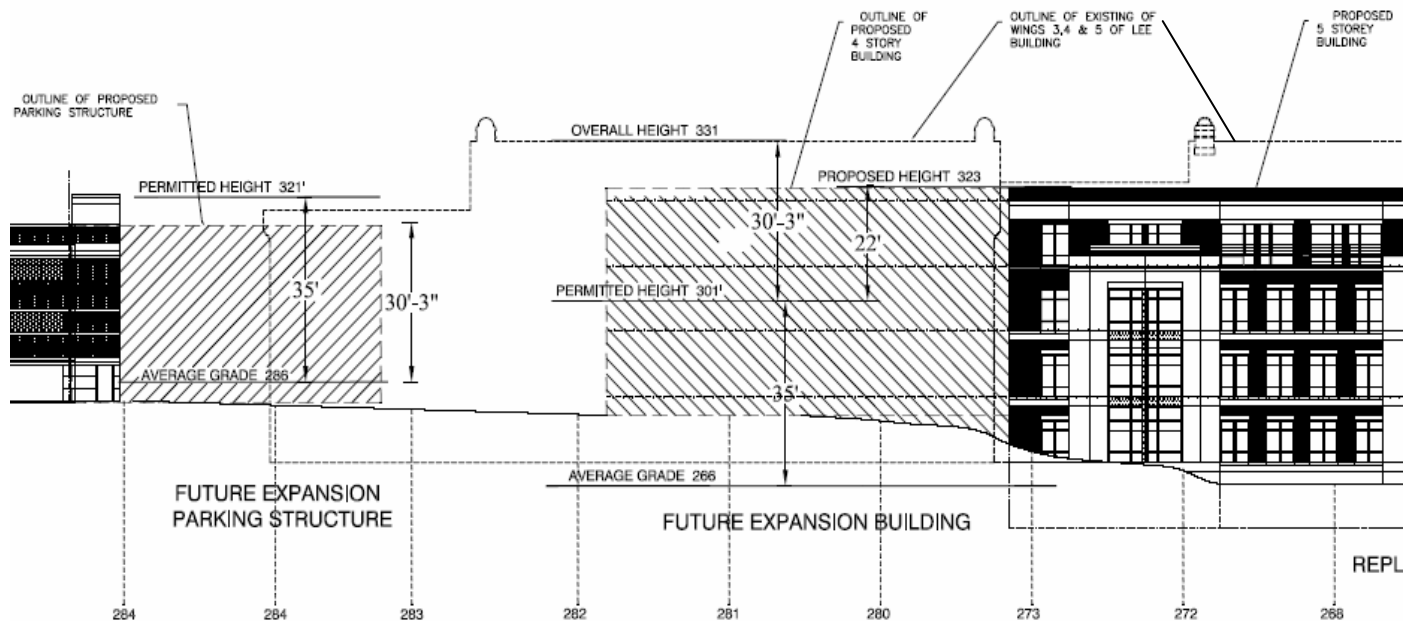
The FASEB property is unique from other properties surrounding it in the R-60 zone in a number of ways. First of all, because of its institutional use, the 11.5 acre lot is much larger than the ordinary residential lot in the R-60 Zone. Secondly, there is a 42 foot elevation difference between Rockville Pike and the ridge of the property.⁷ Tr. 83. Thirdly, it has a large landscaped area covering the southern portion of the property, which, in the public interest, should be left undisturbed. The combination of the second and third factors also creates a practical difficulty in utilizing the land in the absence of the requested variances. For the planned buildings to architecturally correspond to the existing building and provide the functionality necessary for FASEB, their heights, measured from the average ground level in front of both buildings, must be 57 feet, a height that exceeds the R-60 zone height limitations by 22 feet. Exhibit 3, page 13. Moving the buildings further to the south would invade the large landscaped area, adding to the impervious area on the property and destroying some of the buffer which allows this large institution to cohabit so lovingly with neighboring single-family residences.

The proposed structures were therefore intentionally positioned on existing impervious areas (*i.e.*, on the footprint of the existing Lee Building) and adjacent to the existing structures to create the least disturbance to the landscaping and natural resources on the property. The structures were designed to be architecturally compatible with the existing structures and will maintain harmony with the general character of the area. Exhibit 3, page 14.

⁷ Some of the evidence (*e.g.*, Petitioner's Statement in Support of Modification and Variances, Exhibit 3) refers to the difference in elevation as 43 feet, while Petitioner's engineer, Stephen Crum, referred to a difference of 42 feet. Tr. 83. Whether the difference is 42 feet or 43 feet, the practical difficulty this slope creates with regard to Petitioner's use of the property is the same.

The height variance is necessitated by the unusually steep slope of the land where the subject buildings are located. As can be seen from the portion of the Exhibit 4(c) shown below, the steep slope changes the average grade so significantly that the height variance is needed even though the new building will be lower than the Lee Building it is replacing, the outline of which can be seen on the exhibit.

The height of the proposed building addition will be slightly less than the existing Lee building and will be screened or hidden from the views of the single family homes to the south and west of the Property. The heights of all of the



proposed structures are similar to the heights of the existing mid-level to high-rise residential buildings located to the north of the Property. The existing landscaped border along the northern edge of the Property abutting these new structures will be maintained. Exhibit 3, page 15.

The height of the proposed parking structure extension will be lower than the existing Lee Building, equal in height of the existing parking structure and screened from the view of the adjacent single-family residential properties to the south (side) and west (rear) by the topography and wooded areas of the property. Further, the parking structure extension is designed the same as the existing parking structure and will resemble the exterior of a residential structure, not a standard parking structure, to maintain the existing appearance of the FASEB property. Exhibit 3, page 15.

Thus, the height variance will have no impact on the neighbors, and is the minimal needed to allow the new buildings to properly line up with the building already constructed in Phase 1. There is also no way to reduce the amount of the sideyard setback variance being requested. In Phase 2, the variance results, not from an expansion, but merely from the severance of the garage from the

building to the east. In Phase 3, the size of the expansion is governed by the amount of additional length needed to add one bay of cars, which is driven by the required size of parking spaces and drive aisles. Tr. 95-96. Attempting to avoid the need for a variance by constructing the new portion of the garage to the south of the current garage would require demolition of the existing garage. It would also invade the green space to the south and require relocation of underground utilities and relocating the garage entrance. Any such relocation would require extensive grading and loss of landscaping, making it more visible to the single-family neighbors on Altavista Terrace and Altavista Road. Tr. 89-91.

Addressing the third statutory criterion for granting a variance, it is clear that the proposed structures will not impair the intent, purpose or integrity of the Master Plan for all the reasons set forth above in the discussion of the Master Plan and the Special Exception petition. The variances also will not be detrimental to the use or enjoyment of adjoining or neighboring properties because the buildings will actually be lower than the current structures and no closer to the property line. In fact, the proposed new buildings in Phase 2 and Phase 3, as well as the proposed parking structure expansion, are situated on areas of the Property that are currently within the footprint of the existing Lee Building, and will therefore maintain the landscaped views and the existing garden, wooded and grassy areas that are enjoyed by the employees and neighbors of the property. Exhibit 3, page 8.

While these are all good reasons for granting the requested variances, perhaps the best reason is that the Board of Appeals has already ruled favorable on almost identical height variance requests in Phase 1 of this case,⁸ and its stated reasons apply with equal logic to all the variances requested in the current case. As such, the Board's earlier grant of variances on a request to modify the same special exception, and addressing analogous (and with regard to height, almost identical) issues, may amount to administrative law of the case. See, e.g., *Schultze v. Montgomery County Planning Bd.*, 230 Md. 76, 185 A.2d 502 (Md. Nov 19, 1962). It could also be argued that some form of administrative collateral estoppel should be applied, since almost the identical issues were decided by the same quasi-judicial administrative body in the earlier case. Since this issue was not briefed by the Petitioner and Maryland law is somewhat murky on the application of this doctrine and the related doctrine of *res judicata* to administrative proceedings which have not gone to court,⁹ the Hearing Examiner will treat the language of the earlier Board of Appeals decision as instructive, rather than binding in this case. In granting the requested variances in Case No. A-5599, the Board of Appeals stated the following reasons (*Opinion* at p.17-18):

⁸ December 28, 2001 Opinion of the Board in S-862-A and A-5599.

⁹ See, e.g. *Ralph Klein et al. v. Colonial Pipeline Company*, 55 Md.App. 324, 462 A.2d 546 (1983); *Board of County Commissioners of Cecil County v. Racine*, 24 Md.App. 435, 332 A.2d 306 (1978); and *Esslinger v. Baltimore City*, 95 Md.App 607, 622 A.2d 774 (1993).

Section 59-G-3.1 of the Zoning Ordinance provides that the Board may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

1. *By reason of exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property.*

The Board finds that the shape, size and topography of the FASEB Property combined with the history of the use and the existing structures on the Property create an extraordinary situation and condition peculiar to this piece of property that result in practical difficulty for the Applicant in seeking to modify its existing special exception use. In consideration of the shape and topography of the Subject Property and location of the existing structures and natural resources, the Board finds that the desirable solution for the expansion is to position the proposed structures adjacent to the existing administration building on the Property on the improved areas of the site, not to expand on the lawn, wooded areas or slopes on the southern portion of the Property. The Board recognizes that the existing administration building obtained special exception approvals in the past and that the building addition and parking structure were designed at a height slightly lower than the existing building. As indicated on the Architectural Site Plan and Site Section Plan, the topographical conditions of the Property create a downward slope toward the front of the Property on Rockville Pike. (Exhibit Nos. 22, 23 and 31). The grade at Rockville Pike and the grade at the western edge of the proposed parking structure differ by over 43 feet. Therefore, to create a building addition and parking structure that architecturally corresponds to the existing building and provides the functionality necessary for FASEB, the height of the building and structure will need to exceed the R-60 zone height limit by approximately 11'4" and 13' respectively.

2. *Such a variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions.*

The Board finds that the proposed structures are the minimum necessary to satisfy the functional needs of FASEB for the expansion with respect to office, meeting and administrative space and parking areas. The proposed structures were intentionally positioned on existing impervious areas and adjacent

to the existing structures to create the least disturbance to the landscaping, natural resources and slopes on the Property. The structures were designed to be architecturally compatible with the existing structures and will maintain harmony with the general character of the area. Further, the proposed structures will stand lower than the existing building on the Property.

3. *Such a variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property.*

The Board finds that the Master Plan specifically recommends the continuance of the FASEB special exception on the Property because it is a long-term, stable use that is a community resource. Further, the Master plan recognizes that FASEB is one of the special exceptions that might experience needs for expansion.

4. *Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties.*

The Board finds that granting the requested variances will not be detrimental to the use and enjoyment of adjoining and neighboring properties primarily because the position and design of the proposed structures creates minimal interruption of the views from adjacent properties. The proposed new building and parking structure are situated on areas of the Property that are currently parking areas, and will therefore maintain the landscaped views and the existing garden, wooded and lawn areas that are enjoyed by the employees and neighbors of the property.

The Board finds that the height of the proposed building and parking structure will be lower than the existing building and screened from the view of the adjacent single-family residential properties due to the natural screen created by the topography and wooded areas of the Property. The existing landscaped border along the edges of the Property will be maintained. The residential elements of the building facade will create an aesthetically pleasing view for visitors to the Property and for travelers along Rockville Pike, although the existing screening along Rockville Pike is extensive.

The Hearing Examiner adopts the Board's rationale in this case. For the reasons stated by the Board, as well as those set forth in the entire section of this report regarding the variance requests, the Hearing Examiner finds that

Petitioner has met the standards and that the requested variances should be granted.

III. SUMMARY OF THE HEARING

The hearing took place on November 19, 2004, as scheduled.

A. Petitioner's Case

Petitioner called four witnesses at the hearing: Jeffrey L. Yocum, FASEB's facilities manager, Barry Dunn, an expert in architecture, Stephen Crum, a civil engineer and Kevin D. Sitzman, an expert in traffic engineering.

1. Jeffrey L. Yocum:

Jeffrey L. Yocum testified that he is the facilities manager for FASEB. Though not called as an expert, he is "a degreed forester and a degreed mechanical engineer." Tr. 33. He stated that FASEB's mission is to advance science and research that will increase knowledge and improve human health. FASEB was founded in 1912. It is a federation of several societies in the biomedical community dedicated to various aspects of research in medicine and related fields. Currently, there are 14 member societies and eight associate member societies representing approximately 60,000 scientists across the nation. Mr. Yocum noted that FASEB currently has 145 Nobel Prize Laureates "to our record." Tr. 25-26. The resident societies generally manage their respective societies from their offices at FASEB, including "their journals, their scientific meetings, all the management of their memberships and so forth, the nuts and bolts of what it takes to run societies and associations," but no medical research is done there; "It's strictly office-type work." Tr. 26.

Mr. Yocum further testified that FASEB has been on the property since 1954, beginning with the existing manor house. FASEB started office expansions beginning in 1961, again in '62, '67 and '86. The E shaped "Lee" building was done in blocks, with the last wing built in '86. The most recent building was completed in 2003. "Locus Vitae" (the place of life) is the subdivision name. Mr. Yocum identified the buildings on exhibits. The newest building is closest to Wisconsin Avenue. Tr. 27-30. The parking garage was built to avoid encroaching upon the green space on campus. There is a crest about a third of the way from the western border of the property, running diagonally from northwest to southeast.

Mr. Yocum testified that as a result of compromises with the neighborhood during the last special exception proceeding, FASEB put a gate on the Altavista Terrace exit that is limited to just 80 employees who have passes to go in and out. Their passage is recorded, and the neighborhood has the ability to see what FASEB's traffic counts are. Tr. 31-32.

According to Mr. Yocum, it is very difficult to see the neighborhood from the FASEB property, and visa versa, because of the landscaping screen. The trees that stand between FASEB's buildings and the Bethesda Hills project immediately to the north are Lebanese Cedar, which are on the order of 30 to 40 feet tall now. Tr. 33.

The Phase 3 addition of 40,000 square feet is planned for a much later date. Petitioner's plans for Phase 2 will improve the internal traffic for deliveries and that sort of thing. Tr. 34-35. FASEB considered an unsolicited offer to buy

its property but elected to stay if it can implement this plan which “gives us a place to grow into the future for 20 years or so.” Every 10 years or so, FASEB does an evaluation of growth. The current proposal “gives us a place to do that well into the future, providing some stability to the neighborhood.” Tr. 38. FASEB is a non-profit organization, a “501(c)3.”

The height requirements in Petitioner’s proposal are “driven by our constraints. We’re trying to stay on the area that’s building and it’s the disturbed area now and if you don’t spread out, you go up.” Tr. 38. In Mr. Yocum’s opinion, if Petitioner is not allowed to do proceed with its expansion plans, “when we fill our current building up and we start looking for expansion, that we probably would sell the property.” Tr. 40. Mr. Yocum testified that absent the 22 foot variance, the cost would be prohibitive, “unless we went into to the green space, which the neighborhood doesn’t want. My side of the fence doesn’t want - I don’t think it would be good for the County.” Tr. 40-41. Even though Petitioner is asking for a 22 foot height variance, in addition to the 35 feet permitted in a zone, the new building would actually be lower than the level of the current Lee building. Petitioner must work with the sloping topography in designing the building layouts. Tr. 41. According to Mr. Yocum, because of the slope of the property, it would be difficult to see the new structure from Altavista Road.

Mr. Yocum testified that after the 40,000 square feet of space is added, Petitioner plans to hire approximately 120 new employees; however, with Phase Two, Petitioner will maintain the current 580 that the Board approved. The hours of operation and the type of work on the site will not change as a result of the proposed modifications for Phase Two, Phase Three or the addition of other non-profits. Tr. 42. There are staggered hours.

Petitioner has been supporting associations or “501(c)3s” since 1912. It offers many services to member societies and those on campus, including accounting, human resources, meetings and management. “For small associations that the County is interested in incubating, those are the type of services that the County doesn’t have to invent in a incubator program because we have them on campus.” Tr. 43.

Mr. Yocum testified that FASEB has analyzed its parking needs. According to a survey taken in October of 2004, during the peak hours of occupation on campus, a large portion of the parking spaces on the FASEB campus (197 of 434) were found to be vacant. Tr. 44-45.

Pursuant the Board of Appeals Opinion in S-862-A, Petitioner implemented a Transportation Management Plan (Exhibit 9(a) and Tr. 46), which will remain in effect and be updated to maximize the safety and efficiency of traffic, while minimizing any adverse impacts on neighbors. Tr. 47. Among other things, that Plan encourages staggered hours, telecommuting and carpooling to reduce the level of traffic. In addition, Petitioner added a new bus shelter and is willing to comply with all of the conditions that have been set up in the technical staff report requiring additional bus shelters to be constructed, as well as certain other conditions. Tr. 46-47. Petitioner has quarterly meetings with the community council. One of the things that was a major point of the transportation plan was the

restriction on the back door at Altavista Terrace, limiting it to only 80 employees having access in or out, thereby reducing traffic in the neighborhood. And also, there is a light that has been placed at Altavista Terrace and Rockville Pike that allows for U turns and this allows employees on my campus to exit, do a U turn and go north on Rockville Pike, which avoids the need for employees to use the back gate. Tr. 48.

Petitioner will also add a driveway between the new buildings and the garage, which will improve internal circulation, and will add additional turn around space for trucks to more safely access the loading dock near the northern property line. Tr. 48-49. No delivery trucks or commercial vehicles can use the back exit into the residential neighborhood.

Mr. Yocum talked to the management at the Bethesda Hills Apartments and the Pooks Hill Tower, about making a connection through to their parking lot. Petitioner has good relations with these properties, according to Mr. Yocum, and they have not objected to the proposed construction. Tr. 51-52.

As part of the transportation management plan or mitigation plan, there is a requirement for an annual report to the Board of Appeals every in January. It includes minutes of the community council meeting, summaries of all of the items discussed and Petitioner's plans, including the numbers of people that are carpooling and using teleworking. As part of the proposed modification, the revised transportation and management plan will be included in the report requirement. Annual reporting by the Transportation Coordinator to the Board of Appeals will continue. Tr. 53.

In Mr. Yocum's opinion, the modifications and special exceptions will not be detrimental to the surrounding properties or the neighborhood or cause any adverse consequences. Rather, Petitioner will create a structure that has actually a lower profile but in the same space. "I think overall you'll have a much lower presence, smaller view of the buildings" and will continue in harmony with the character of the neighborhood, "pretty much what we've been doing for 50 years." Tr. 54-55.

Petitioner is requesting the 12 years to complete the Phase Three portion of the modification. Tr. 54-55.

Petitioner's counsel, Anne Martin, explained that Phase Three was a long term plan and it was tied to a 12 year period that approvals by the Planning Board last under the Adequate Public Facilities Ordinance. Ms. Martin felt that if the current Petition is approved and work begins on Phase Two within two years, implementation of Phase Three could await the 12 year period. The People's Counsel disagreed, and indicated that Petitioner would have to get extensions from the Board of Appeals if Phase 3 did not begin within 2 years. Tr. 56- 61.

2. Barry Dunn:

Barry Dunn testified as an expert in architecture. He did the initial site planning and design of the buildings that were constructed in Phase 1. "The focus of all our attention was to minimize the site impact because the site is really quite magnificent. It's very well treed. It has some interesting topography and also, it has a very large sort of meadow quality in the southern part of the site. We all felt that should stay, that whatever we did, we should try to work within the

existing asphalted areas.” Tr. 66. When he came to look at the proposed replacement building and the proposed addition to that, his focus was to keep everything within the area between the Phase 1 building and the garage.

As a consequence of following these plans, in Mr. Dunn’s opinion, “it not only improved the traffic circulation, but it had almost zero impact on the general environmental landscaping of the site. Also, because the building is slightly less in height than the existing Lee building, it had, I think, an improvement over any visual impacts.” Tr. 67.

In reference to architectural style, Mr. Dunn testified that did not want to duplicate the “neo-Georgian” style of the existing building, but rather wanted to create something that was compatible with it in scale and texture. He opted for a masonry building, with cast stone accents and punched windows rather than ribbon windows. In Mr. Dunn’s opinion, he developed a flavor of architectural style which was sensitive to the neighborhood and sensitive to the existing building. He “fragmented the form of the building” so that it would minimize its mass. It’s a deeper building than the existing building. “The existing E shaped building is based on a corridor and approximately six foot depth, which really doesn’t work very well for office buildings any more. So, we came up with a deeper building and in order to mitigate that, we made the surface of it considerably articulated.” Tr. 68.

Mr. Dunn testified that, pursuant to the Zoning Ordinance, he calculated the average grade of the buildings on the sloping terrain. For the heights of the proposed buildings to match the existing ones, a height variance of 22 feet is required. Tr. 72. The required variance would have been reduced if the ground had been level. Tr. 73.

The lighting outside the building has been designed to point down so that no glare reaches the property line. The buildings windows will be tinted for the same reason. Tr. 76. A photometric study showed light at less than 0.1 foot-candles at the property line.

In Mr. Dunn’s opinion, the proposed structural changes on the FASEB campus will be compatible both with the existing structures and the neighborhood (Tr. 77).

3. Stephen Crum:

Stephen Crum testified as an expert in civil engineering. His firm did the site plan for the subject modifications, including civil engineering and landscape architecture. Using an aerial photo (Exhibit 20), Mr. Crum demonstrated that the FASEB property was quite different from the nearby lots.

the character of the FASEB lot is much larger in size. It’s irregularly shaped. It has frontage on three streets where in the R60 zone a typical single family house detached has frontage on one street. Most of the lots in the neighborhood are rectangular or trapezoidal in shape. Their structure size in relationship to the lot coverage, the green space around the structures are distributed with narrow side yards and reasonable front and rear yard where the FASEB campus has a large park-like setting to the southern portion of the property and the major development

clustered on the northern portion of this property closer to the higher density properties to the north. Tr. 81.

Mr. Crum testified that the FASEB property is unique from other properties surrounding it in the R-60 zone in a number of ways. First of all, because of its institutional use, the 11.5 acre lot is much larger than the ordinary residential lot in the R-60 Zone. Secondly, there is a 42 foot elevation difference between Rockville Pike and the ridge of the property, which would be very unusual for a single family residential lot.¹⁰ In Mr. Crum's opinion, the topography here creates a hardship for the development of this property. There is also a great deal of unique landscaping on the property. In Mr. Tr. 83.

Mr. Crum also described the planned Phase 2 building to replace the Lee Building, and the addition of a drive aisle separating the garage and the new building. In Mr. Crum's opinion, the important thing to note is that the buildings are being clustered on the northern portion of the site to preserve the large park like green space to the south of the site, which most immediately borders the residential properties to the south. Tr. 82.

Mr. Crum then explained the need for sideyard setback variances for the garage. Severing the garage from the main building, which occurs in Phase 2, makes the garage an accessory structure, subject to different setback requirements even though it is not being enlarged in Phase 2. Under the Zoning Ordinance, the sideyard setback for an accessory building in this Zone is dependent on the building's length, if it is greater than 24 feet, which the subject garage is. Since the garage is 122 feet 4 inches in length (Tr. 86; Exhibit 4(c)), it exceeds 24 feet by 98.33 feet (122.33 feet – 24 feet = 98.33 feet). Applying the statutory language, the setback is determined by adding one foot for every two feet of excess over 24 feet, and then dividing the excess (98.33 feet) by 2, yielding a result of 49.165 feet. Adding that result to the base accessory building setback of 5 feet, yields the required Phase 2 sideyard setback for the garage of 54.165 feet. The actual distance of the garage from the northern property line is 52 feet 3 inches (*i.e.*, 52.25 feet). Subtracting the actual setback of 52.25 feet from the required setback of 54.165 feet yields a shortfall of 1.915 feet (54.165 – 52.25 = 1.915). Rounding off, Petitioner needs a 1.92 foot sideyard setback variance in Phase 2. Tr. 84-86.

In Phase 3, the garage length will be expanded by 60 feet (Exhibit 4(c)). Applying the same statutory provision means that one foot will have to be added to the required setback for every extra two feet added. Thus, the required setback will grow by 30 feet, from 54.165 feet to 84.165 feet. Since we know that the actual setback will not change from 52.25 feet, the shortfall in Phase 3 will be 31.915 feet. Rounding off, Petitioner seeks a 31.92 foot side yard setback variance in Phase 3. Tr. 87-88.

¹⁰ Some of the evidence (*e.g.*, Petitioner's Statement in Support of Modification and Variances, Exhibit 3) refers to the difference in elevation as 43 feet, while Petitioner's engineer, Stephen Crum, referred to a difference of 42 feet. Tr. 83. Whether the difference is 42 feet or 43 feet, the practical difficulty this slope creates with regard to Petitioner's use of the property is the same.

Mr. Crum testified that attempting to avoid the variance by constructing the new portion of the garage to the south would require demolition of the garage and would be "an extreme hardship." It would also invade the green space to the south and require relocation of underground utilities and the garage entrance. Any such relocation would require extensive grading and loss of landscaping, making it more visible to the single-family neighbors on Altavista Terrace and Altavista Road. Tr. 89-91. In Mr. Crum's opinion, there is no way to reduce the amount of the variance being requested. In Phase 2, the variance results, not from an expansion, but merely from the severance of the garage from the building to the east. In Phase 3, the size of the expansion is governed by the amount of additional length needed to add one bay of cars, which is driven by the required size of parking spaces and drive aisles. Tr. 95-96.

Mr. Crum testified that the property had adequate water and sewer services (Tr. 92), and that a Preliminary Storm Water Management Concept Plan has been approved by the Department of Permitting Services (DPS). Tr. 97. Mr. Crum indicated that Petitioner will be providing both quantity and quality management for the new structure, and that will be an improvement to the environment over the existing conditions, "in that the Lee building's roof water currently runs off without any storm water management controls." Tr. 97. The new storm water management facility will be designed to the new State of Maryland criteria that went into effect two years ago.

Mr. Crum further testified that, in order to get a building permit in Montgomery County, you need to have a sediment control permit, and Petitioner will develop plans that will be reviewed and approved by the Department of Permitting Services to control soil erosion and sediment during the construction of phase two and ultimately, phase three. Tr. 98. In Mr. Crum's opinion, Petitioner will qualify for a forest conservation exemption under this special exception petition, but will nevertheless prepare a tree protection plan that will be implemented by the contractor to preserve the park-like setting. Tr. 98-99. There are some individual trees, but no forest in the area of the proposed phase two and phase three structures.

Based on his analysis as an expert in civil engineering, Mr. Crum opined that the proposed modification to the use on the property and the variances will have no adverse effect in any manner on the community. Tr. 100.

4. Kevin D. Sitzman:

Kevin Sitzman testified as an expert in traffic engineering and transportation planning. Pursuant to instructions he received from Park and Planning staff, Mr. Sitzman applied the Local Area Transportation Review (LATR) standards in effect at the time the instant Petition was filed, *i.e.*, prior to July 1, 2004. Tr. 106. He described the local roadways serving the subject property, and following the LATR guidelines, studied a number of nearby intersections. Tr. 111-113.

Mr. Sitzman testified that because Phase 2 is essentially a building replacement, "[i]t would generate no new trips . . ." Tr. 121. As to the impact of Phase 3, eight intersections were studied by Mr. Sitzman, and he concluded that only the intersection at Cedar Lane and Maryland Route 355 (Rockville Pike)

exceeded the applicable critical lane volume (clv) standard of 1650.¹¹ The clv at that intersection for existing traffic is 1,722 in the a.m. peak hour and 1,717 in the p.m. peak hour. When background traffic (*i.e.*, including other developments in the pipeline) is added in, the a.m. peak hour has a clv of 1,729 and the p.m. peak hour has a clv of 1,724. Based on the traffic counts for the existing facility, Phase 3 would add 40 new a.m. peak hour trips and 42 new p.m. peak hour trips. This would raise the critical lane volume at Cedar Lane and Route 355 by a single additional clv unit in the morning (raising the a.m. peak hour clv to 1,730), and two clv units in the evening (raising the p.m. peak hour clv to 1,726). Tr. 113-118.

Because of the current traffic mitigation efforts, especially teleworking, FASEB has a peak hour trip generation rate that is 35-38 percent lower than a typical office building in similar areas of the County. Tr. 120. The Transportation Management Plan (Exhibit 9(a)) also addresses access, circulation, parking policies, community relations and safety considerations. Tr. 119-120. Petitioner has also agreed to add three more bus shelters, and Mr. Sitzman testified that, for Phase 3, “the expansion and the proposed mitigation measures, would result in critical lane volumes identical to the background levels, fully mitigating the site impacts and satisfying the local area transportation review guidelines.” Tr. 119-121.

Mr. Sitzman testified that the appropriate staging ceiling under Policy Area Transportation Review (PATR) is 390 jobs because that was the figure in effect prior to the filing date of this Petition on June 18, 2004. Tr. 124. Since Petitioner is seeking permission to generate 120 additional jobs in Phase 3, that plan would be consistent with the staging ceiling cited by Mr. Sitzman.

B. People’s Counsel

Martin Klauber, the People’s Counsel, made a factual statement at the hearing, and he participated in support of the Petition.

Mr. Klauber testified that there was a great deal of neighborhood interest when Petitioner sought to modify its special exception in 2001, not all of it positive, but the residents of the Bethesda Hill Community to the north “have been absolutely silent” throughout both cases. Tr. 16. The People’s Counsel stated that, “This petitioner has gone far and above what is reasonable in contacting its immediate neighbors [to the north] and there has been no response . . .” Tr. 16. He further testified that FASEB had responded “in a positive way to every community concern about the existing operations of FASEB, the past operations of FASEB and more importantly, the future operations of FASEB.” Tr. 17.

Mr. Klauber characterized FASEB as “a good neighbor, . . . a neighbor that adds a positive contribution to its neighborhood, its community, and

¹¹ Both the Petitioner’s expert and the Transportation Planning Staff applied the CLV standards in effect prior to July 1, 2004, because the Petition was filed prior to that date. The current clv standard for the one non-compliant intersection is 1600 clv; however, because recommended traffic mitigation measures will reduce the projected clv at the intersection to at or below the level before the new construction, it is immaterial which standard is applied.

moreover, Montgomery County.” Tr. 17. He noted FASEB’s proximity to NIH and the Howard Hughes Medical Institute, and opined that FASEB was one of the three components constituting “a triumvirate of aligned experimental medical activities that are so very important to Montgomery County.” Accordingly, “Its continued existence on this site and its expansion are truly in the public interest of Montgomery County.” Tr. 18

The People’s Counsel summed up its own position by saying that “the office of the People’s Counsel, unequivocally, and without reservation, is so very pleased to support the expansion of FASEB that you will hear in detail about today. Mr. Yocum especially, and Dr. Rickles have been so forthcoming with the neighbors, all the neighbors and the office that I represent, that they truly reflect an institute whose existence and continuance is in the public interest of Montgomery County as a whole.” Tr. 18.

C. Government Witness

Hafiza Haleem, an employee of the Department of Economic Development testified on behalf of her agency in support of the expansion and renovation of the facilities on FASEB’s property. Tr. 20-23. Ms. Haleem stated that for approximately nine years, she has been working directly with “the association community of Montgomery County,” and “this is one of a handful that is of the caliber that would attract other national and recognized associations to Montgomery County. So, from an economic development perspective, this is a jewel for us.”

Ms. Haleem testified that FASEB is “invaluable to us” from an economic development marketing standpoint for its ability to express and espouse the benefits of actually being here in Bethesda and in Montgomery County. Since losing FASEB would be a major loss to Montgomery County, the County has done everything that it can in order to be able to support its expansion and everything that they have needed in order to be able to continue to attract the kind of groups that would be members of the federation. The County also supports helping other associations to be housed on the campus, so that FASEB can mentor and teach them.

Ms. Haleem further testified that FASEB has played a major role in creating the attractiveness of the biotech community that has grown within Montgomery County and has actually given us international recognition through its publications, its level of expertise and the type of research and development that it espouses, as well as its 145 Nobel laureates, dating back to Dr. Pavlov. As stated by Ms. Haleem, “[t]hat is exactly . . . the type of economic development that we are looking to create and to continue and we can only hope that FASEB will maintain the current stream or flow that it’s on and be able to call Montgomery County home for many years to come.” Tr. 23. On cross-examination, Ms. Haleem agreed that there is a need for FASEB to remain in the County, and there is a County need for such a use.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, because Petitioner's plans include an expansion of the total floor area by more than either of the alternative statutory criteria (7500 square feet or 25%), the scope of this inquiry includes a review of the "underlying special exception[s]," and is not limited by statute to "discussion of those aspects of the special exception use that are directly related to [the modification] proposals."

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed modifications, taken in combination with Petitioner's transportation management plan, traffic impact mitigation plan (adding three bus shelters), the buffering effects of the landscape and the unusual site conditions, will successfully avoid any adverse effects on the community and will meet the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational

characteristics are necessarily associated with a private educational institution use. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff suggested that the inherent adverse effects associated with private educational institutions include “buildings that have an institutional design dictated by licensing and building code requirements, the parking and traffic associated with the movement of students, faculty and support staff people to and from the property, and in the case of most private educational institutions, playgrounds and athletic fields.” The Hearing Examiner accepts that summary description of the inherent adverse effects that are ordinarily associated with private educational institutions, and we must now analyze the subject use to determine whether the requested modifications will produce any non-inherent adverse effects warranting denial of the Petition.

B. Applying the Standard to the Requested Modifications

As noted by Technical Staff, the proposed use does not share many of the characteristics of educational institutions which can adversely affect a neighborhood, such as noisy playgrounds and athletic fields, and the traffic often associated with transporting students. Rather than educating large numbers of students on the campus, Petitioner's activities involve administrative functions which promote education and efficient administration for the biomedical and life science fields. Thus, unlike most educational institutions, Petitioner's use of the subject premises is unlikely to create many of the adverse effects on surrounding neighborhood one might anticipate for this type of special exception. Moreover, the inherent adverse effect of traffic it does create will likely be less than that which would be created by a typical private educational institution which caters to a large student body.

As to the proposed changes in the physical plant, the additional buildings and the parking garage expansion will be consistent with the size, scale and scope of the existing improvements, and the manner in which they are situated is similar to the existing structures. The building will incorporate architectural design features to provide compatibility with the existing buildings on the property and to reduce impacts to neighboring properties. According to Technical Staff, “the proposed lighting for the building and the parking garage are consistent with the previously approved lighting, and given the topographical conditions, lighting from the parking garage and the buildings will not impact adjoining properties.” This opinion is confirmed by the photometric studies shown in Exhibits 5(c) and (d), which predict no more than 0.1 footcandle of light at the property line. The traffic impact on nearby residential streets is limited by the previous conditions of approval for Phase 1 of this project, and the additional impact of traffic generated

by the expected additional employees will be eliminated by the mitigation measures suggested by Transportation Planning Staff.

After carefully reviewing the entire record, the Hearing Examiner is convinced, as was the Technical Staff, that the requested modifications, if properly conditioned, will have no significant adverse effects, inherent or non-inherent, on the surrounding area.

C. General Standards

The general standards for a special exception are found in Zoning Code Section 59-G-1.21(a). The Technical Staff reports and the Petitioner's exhibits and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Conclusion: Private educational institutions are permitted by special exception in the R-60 Zone involved in the subject case.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modifications would comply with the standards and requirements for private educational institutions set forth in Code §59-G-2.19, as detailed in Part IV.D., below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the*

special exception must include specific findings as to master plan consistency.

Conclusion: The property is included under the 1990 Bethesda-Chevy Chase Master Plan area. The Master Plan expressly calls for: “[r]esidential zoning and continuation of the existing use . . . for the . . . Federation of American Societies for Experimental Biology” and certain other properties. Page 33. The Master Plan specifically recommends that FASEB should continue the existing use because “. . . long-term, stable uses . . . [are] viewed as community resources.”

The Master Plan even recognizes that “new development on these sites will also require amendment to existing special exception conditions to protect the setting of the use and to maintain compatibility with nearby properties.” Page 33. New conditions are recommended in this report both with regard to transportation and the environment, as a result of the new development. Moreover, because the new construction being proposed remains in the same area previously occupied by similar structures, and the new structures will actually be shorter than the current Lee administrative building and well buffered from surrounding properties, the Hearing Examiner finds that there will be minimal, if any, impact on compatibility.

Thus, the Hearing Examiner finds that nothing in the proposed Modification Petition is inconsistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed modifications would be in harmony with the general character of the neighborhood. The general and surrounding neighborhood is predominantly residential in character. The additional buildings and parking garage expansion will be consistent with the design, density, size, scale and scope of the existing improvements, and the manner in which they are situated is similar to the existing structures. Technical Staff notes that the new buildings will incorporate architectural design features to enhance their compatibility with the existing buildings on the property and the surrounding neighborhood. Very little of the proposed structures will be visible from the adjacent residences. The proposed structures were intentionally positioned on existing

impervious areas (existing Lee Building) and adjacent to the existing structures to create the least disturbance to the landscaping and natural resources on the property. The structures were designed to be architecturally compatible with the existing structures and in harmony with the general character of the area. Exhibit 3, page 14.

According to Technical Staff, the additional employees on the subject property will achieve a density of 63 persons per acre, below the "87 pupils per acre" referenced in Zoning Ordinance §59-G-2.19(a)(4)a.5. Internal circulation is provided, and vehicles will be able to enter, drop-off or pick-up, park and exit the site with little difficulty utilizing existing entrances and drive aisles. Traffic impact on nearby residential streets generated by the additional buildings is limited by the previous approval that limits vehicle entry at the rear entrance to 80 per hour and by the mitigation conditions prescribed by Transportation Planning Staff. Landscaping will reduce impacts on adjacent properties throughout.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that, with the specified conditions, the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. The modifications will not be detrimental to the use or enjoyment of adjoining or neighboring properties because the buildings will actually be lower than the current structures and no closer to the property line. In fact, the proposed new buildings in Phase 2 and Phase 3, as well as the proposed parking structure expansion, are situated on areas of the Property that are currently within the footprint of the existing Lee Building, and will therefore maintain the landscaped views and the existing garden, wooded and grassy areas that are enjoyed by the employees and neighbors of the property. Exhibit 3, page 8.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in the record that FASEB's current operations cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. No laboratory experimentation is conducted on-site, and no major printing is conducted on the Property. Petitioner states in Exhibit 3, at page 9, that "[t]he use by employees is primarily a daytime use, so all lighting levels on buildings and parking areas will include downward light fixtures with foot candle levels only necessary for safety and security, and will thus not create glare onto adjacent properties. The proposed use will be mostly limited to the indoors, and most parking will be limited to the interior of the parking garage. Because of topography and vegetation, including large trees, and landscaping, the use is not be readily visible from adjoining properties. Given the size of the FASEB campus, the proposed employee increases and additional structures are unlikely to change that circumstance. Photometric studies (Exhibits 5(c) and (d)) demonstrate that campus lighting will not spill out onto surrounding properties in excess of permitted limits (.1 footcandle at grade).

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff mentions "one approved special exception . . . adjacent to the property located on Lot 1, Block A (BA-823)," but concludes that "[t]he modification is to a long-term stable use that has been a community resource since 1954, and it will not alter the nature of the area and it does not create an excessive concentration of special exception or other non-residential land uses in the neighboring one-family residential area." As has already been mentioned, the use is consistent with the express recommendations of the Master Plan, so it cannot be said to alter the nature of the area. In sum, the Hearing Examiner concludes that the modifications proposed in the subject case would not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of*

any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The use has operated in the area for many years without causing these adverse effects. The evidence supports the conclusion that the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(i) *If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review[LATR] and the Policy Area Transportation Review[PATR], as required in the applicable Annual Growth Policy.*

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. There is ample evidence in the record proving the adequacy of public facilities. Transportation facilities are discussed in Part II. F. of this Report, where we concluded that both LATR and PATR have been satisfied. Petitioner's engineering expert, Stephen Crum, testified to the adequacy of water and sewer services (Tr. 92).

Transportation Planning Staff found that the proposed changes, in combination with the recommended conditions "will not have an adverse effect on area roadway conditions." Moreover, as noted by Technical Staff, traffic reduction measures are in place at the rear entrance on Alta Vista Terrace that have improved, and will

continue to improve, safety of vehicular and pedestrian traffic. The Transportation Management Plan (Exhibit 9(a)) also addresses access, circulation, parking policies, community relations and safety considerations. Tr. 119-120. Based on the evidence in this record, the Hearing Examiner concludes that the proposed modifications, as conditioned, would not create a significant adverse traffic impact, nor reduce the safety of pedestrian or vehicular traffic.

D. Specific Standards: Educational Institutions, Private

The specific standards for a private educational institution are found in Code § 59-G-2.19. The Technical Staff reports and the Petitioner's exhibits and testimony provide sufficient evidence that the proposed modification would be consistent with these specific standards, as outlined below.

Sec. 59-G-2.19. Educational institutions, private.

(a) *Generally. A lot, tract or parcel of land may be allowed to be used for a private educational institution if the board finds that:*

(1) *the private educational institutional use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity, or any other element which is incompatible with the environment and character of the surrounding neighborhood;*

Conclusion: For the reasons set forth in the General Standards section above, it is clear that the use, as modified, will not constitute a nuisance because of traffic, number of students, noise, or type of physical activity. As noted by the Technical Staff, there are no external physical activities associated with this use, other than traveling to and from the property. The evidence is that Petitioner has gone out of its way to be a good neighbor, as described by the People's Counsel: "[Petitioner has] been so forthcoming with the neighbors, all the neighbors and the office that I represent, that they truly reflect an institute whose existence and continuance is in the public interest of Montgomery County as a whole." Tr. 18. The compatibility of the subject use with the environment is also amply demonstrated in the record, as set forth in Part II.E. this Report.

(2) *except for buildings and additions completed, or for which a building permit has been obtained before (date of adoption [April 2, 2002]), the private educational institution must be in a building architecturally compatible with other buildings in the surrounding neighborhood, and, if the private educational institution will be located on a lot, tract, or parcel of land of 2 acres*

or less, in either an undeveloped area or an area substantially developed with single-family homes, the exterior architecture of the building must be similar to a single-family home design, and at least comparable to any existing homes in the immediate neighborhood;

Conclusion: The evidence in this record supports the conclusion that the proposed structural changes on the FASEB campus will be compatible both with the existing structures (Tr. 68) and with the neighborhood (Tr. 77). As Technical Staff points out, “[t]he proposed buildings will incorporate architectural design features to enhance their compatibility with the existing buildings on the subject property and in the surrounding neighborhood. It is evident that these plans were composed with compatibility in mind.”

(3) the private educational institution will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and

Conclusion: The use, as modified, will not adversely affect or change the present character or future development of the surrounding neighborhood. Petitioner has been careful to plan construction of the new buildings on the footprint of the building being replaced, and at a lower height, so that there will be minimal impact on the surrounding area.

(4) the private educational institution must conform with the following standards in addition to the general development standards as specified in Section G-1.23:

a. *Density—The allowable number of pupils per acre permitted to occupy the premises at any one time must be specified by the Board considering the following factors:*

1. *Traffic patterns, including:*
 - a) *Impact of increased traffic on residential streets;*
 - b) *Proximity to arterial roads and major highways;*
 - c) *Provision of measures for Transportation Demand Management as defined in Section 42A-21 of the Montgomery County Code;*
 - d) *Adequacy of drop-off and pick-up areas for all programs and events, including on-site stacking space and traffic control to effectively*

deter queues of waiting vehicles from spilling over onto adjacent streets; and

2. *Noise or type of physical activity;*
3. *Character, percentage, and density of existing development and zoning in the community;*
4. *Topography of the land to be used for the special exception; and*
5. *Density greater than 87 pupils per acre may be permitted only if the Board finds that (i) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; (ii) the additional density will not adversely affect adjacent properties; (iii) additional traffic generated by the additional density will not adversely affect the surrounding streets.*

Conclusion: To the extent that the term “pupil density” can be applied to a facility such as FASEB, by substituting “employees” for “pupils,” the Petitioner has requested a maximum of 700 employees on an 11.2 acre campus, yielding a density of approximately 63 employees per acre, well below the 87-per-acre maximum.

The traffic situation has been discussed at length in Part II. F. of this Report, as noted in the discussion of the general standards. The Hearing Examiner concludes that Petitioner's Transportation Management Plan is sufficient to avoid queuing on public streets or other traffic problems for its neighbors even at the 700 employee level. Technical Staff reached the same conclusion. Questions of noise, physical activity and the nature of surrounding development have all been considered in the above discussion of the general standards. The topography of the FASEB campus has no bearing on the density of employee issue, although it has a major impact on the need for a height variance, as discussed elsewhere in this report. Based on all these factors, and the on the analysis of General Development Standards discussed below, the Hearing Examiner concludes that Petitioner's proposed cap of 700 employees will not create an excessive employee density.

- b. *Buffer—All outdoor sports and recreation facilities must be located, landscaped or otherwise buffered so that the activities associated with the facilities will not constitute an intrusion into adjacent residential properties. The facility must be designed and sited to protect adjacent properties*

from noise, spill light, stray balls and other objectionable impacts by providing appropriate screening measures, such as sufficient setbacks, evergreen landscaping, solid fences and walls.

Conclusion: There are no plans for “outdoor sports and recreation facilities.” As stated in the discussion of the General Standards, Petitioner’s buildings are well buffered, and that fact will not change if the Modification Petition is approved.

- (b) *If a Private Educational Institution operates or allows its facilities by lease or other arrangement to be used for: (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, the Board must find, in addition to the other required findings for the grant of a Private Education Institution special exception, that the activities in combination with other activities of the institution, will not have an adverse effect on the surrounding neighborhood due to traffic, noise, lighting, or parking, or the intensity, frequency, or duration of activities. In evaluating traffic impacts on the community, the Board must take into consideration the total cumulative number of expected car trips generated by the regular academic program and the after school or summer programs, whether or not the traffic exceeds the capacity of the road. A transportation management plan that identifies measures for reducing demand for road capacity must be approved by the Board.*

The Board may limit the number of participants and frequency of events authorized in this section.

Conclusion: Not Applicable.

- (c) *Programs Existing before April 22, 2002.*

(1) *Where previously approved by the Board, a private educational institution may continue the operation of (i) tutoring and college entrance exam preparatory courses, (ii) art education programs, (iii) artistic performances, (iv) indoor and outdoor recreation programs, or (v) summer day camps, whether such programs include students or non-students of the school, if the number of participants and frequency of*

events for programs authorized in 59-G-2.19(b) are established in the Board's approval.

(2) Where not previously approved by the Board, such programs may continue until April 22, 2004. Before April 22, 2004, the underlying special exception must be modified to operate such programs, whether such programs include students or non-students of the school. The Board may establish a limit on the number of participants and frequency of events for authorized programs.

Conclusion: Not Applicable.

(d) *Site plan.*

(1) In addition to submitting such other information as may be required, an Petitioner shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.

(2) No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.

Conclusion: As noted by the Technical Staff, Petitioner "has submitted such a plan [Exhibits 4(a), (b) and (c) and 5(a) through (d)] and staff finds it acceptable."

- (e) *Exemptions. The requirements of Section G-2.19 do not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County. This exemption does not apply to any private educational institution which received approval by the Board of Appeals to operate a private educational institution special exception in a building or on a lot, lots or tract of land that was not owned or leased by any church or religious organization at the time the Board of Appeal's decision was issued.*

Conclusion: Not Applicable.

- (f) *Nonconforming uses. Nothing in this chapter shall prevent any existing private educational institution which obtained a special exception prior to the effective date of this chapter, from continuing its use to the full extent authorized under the resolution granting the respective special exception, subject, however, to division 59-G-4 of this chapter.*

Conclusion: Not Applicable.

- (g) *Public Buildings.*

(1) *A special exception is not required for any private educational institution that is located in a building or on premises that have been used for a public school or that are owned or leased by Montgomery County.*

(2) *However, site plan review under Division 59-D-3 is required for:*

(i) *construction of a private educational institution on vacant land owned or leased by Montgomery County; or*

(ii) *any cumulative increase that is greater than 15% or 7,500 square feet, whichever is less, in the gross floor area, as it existed on February 1, 2000, of a private educational institution located*

in a building that has been used for a public school or that is owned or leased by Montgomery County. Site plan review is not required for: (i) an increase in floor area of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County if a request for review under mandatory referral was submitted to the Planning Board on or before February 1, 2000, or (ii) any portable classroom used by a private educational institution that is located on property owned or leased by Montgomery County and that is in place for less than one year.

Conclusion: Not Applicable.

- (h) *Applications filed before May 6, 2002. Any application filed before May 6, 2002 for a private educational institution special exception or modification of a private educational institutional special exception must comply with the requirements of Article 59-G and Article 59-E in effect at the time the special exception was filed.*

Conclusion: Not Applicable.

E. Additional Applicable Standards

59-G § 1.23. General development standards

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The following chart from the Technical Staff Report (Exhibit 18), demonstrates compliance with all development standards, except those for which a variance is sought:

Table 2. Comparison of Development Standards:

Item	Required/Allowed	Phase 2 Proposal	Phase 3 Proposal
Lot Area	6,000 sq. ft.	11.2 acres	11.2 acres

Yard Requirements for Main Building:			
Front- Rockville Pike	25 ft.	110.5 ft.	110.5 ft.
Side-	8 ft.	43.4 ft.	43.4 ft.
Rear-	20 ft.	417 ft.	417 ft.
Building Height	46 ft. – 4 in. Allowed ¹	57 ft. ^{2a}	57 ft. ²
Accessory Building Height	38 ft. ¹	30 ft. – 3 in.	30 ft. – 3 in.
Building Coverage	35%	13.8%	17.7%
Yard Requirements for Accessory Building (Parking Structure):			
Front- Rockville Pike	60 ft.	236 ft.	236 ft.
Rear-	69 ft. – 2 in.	147 ft. – 4 in.	147 ft. – 4 in.
Side-	54 ft. – 2 in. (Phase 2)	52 ft. - 3 in. ²	52 ft. - 3 in. ²
	84 ft. – 2 in. (Phase 3)		

1. Approved Case No. A-5599, December 8, 2001

2. Current Variance Request Case No. A-6008.

- a. Phase 2 building expansion will require a 22' height variance.
- b. The parking structure will become an accessory structure once it is detached from the existing building during Phase 2; this requires a 1.92 ft. side yard variance.
- c. A 31.92 ft. side yard variance will be required for Phase 3.

As discussed at length in Part II.H. of this report, the proposed Phase 2 building and the Phase 3 building expansion will require a 22 foot height variance. The parking structure will become an accessory structure once it is detached from the existing building; this requires a 1.92 ft. side yard variance for Phase 2. A 31.92 ft. side yard variance will be required for Phase 3 because 60 feet will be added to the length of the garage.

(b) ***Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.***

Conclusion: There are currently 434 parking spaces on the campus, 217 of which are located in the 4 level garage which was constructed as part of Phase 1. During Phase 3, a 104 parking space extension will be added to the existing 4-story garage. Since that extension will cause the loss of 26 surface parking spaces, the net gain will be 78 additional parking spaces, bringing the campus total up to 512 spaces (434 + 78). *Zoning Ordinance §59-E-3.7 requires that private educational institutions*

provide “[o]ne parking space for each employee, including teachers and administrators, plus sufficient off-street parking space for the safe and convenient loading and unloading of students, plus additional spaces for all student parking.” Because Petitioner’s plans call for a maximum of 700 employees in Phase 3 (and no students), the proposed parking total of 512 spaces does not fully meet the one-to-one parking space requirements of Zoning Ordinance §59-E-3.7. However, the Zoning Ordinance provides an alternative, as follows:

Section 59-E-4.5. Waiver – parking standards.

The Director, Planning Board, or Board of Appeals may waive any requirement in this Article not necessary to accomplish the objectives in Section 59-E-4.2, and in conjunction with reductions may adopt reasonable requirements above the minimum standards. Any request for a waiver under this Section must be referred to all adjoining property owners and affected citizen associations for comment before a decision on the requested waiver.

Even though there are currently only 434 parking spaces on campus, and there is no such waiver in the record, the Board of Appeals did approve up to 580 employees in granting S-862-A in December of 2001. While that decision is the law of the case regarding this special exception, nothing in the Board’s 2001 Opinion permits Petitioner to bring up to 700 employees to the site (Petitioner’s current request) absent adequate parking under §59-E-3.7 or the waiver required by statute. Petitioner has therefore requested a waiver of the parking requirements. Based on the evidence that Petitioner can accomplish the objectives set forth in §59-E-4.2 with 512 parking spaces, as discussed in Part II. F. of this report, the Hearing Examiner recommends granting the requested waiver.

In addition to the requirements of §59-E-3.7, Article 59-E imposes other requirements for parking facilities, which can be found in §59-E-4.1, *et seq.* These provisions require a parking facilities plan with the following contents:

Sec. 59-E-4.4. Contents of the parking facilities plan.

The parking facility plan shall show the location and design of entrances and exits to public roads; the location and size of all buildings and structures; the location of parking spaces, directional markings, traffic-control devices and signs; walls and fences; landscape areas; slopes or berms; change of grades; planting materials, including the type and names of the materials to be planted; and such other information as required by either the director or the planning board. The parking facility plan shall be prepared with careful regard to the objectives for parking facilities enumerated in section 59-E-4.2 and the relationship between the parking facility and surrounding commercial, industrial,

or residential improvements. Parking areas, therefore, shall be located so as to prevent an adverse effect on such adjoining or neighboring properties. Shrubs, trees, walls, fences, berms or other materials used as a screen shall be of a permanent nature, requiring as little maintenance as possible. Planting strips in which trees or other natural growth are located shall be of sufficient width or shall be so designed so that the plantings and trees are protected from vehicles in accordance with section 59-E-2.74. Trees and plants shall not be of a variety that contains offensive or injurious gum, moisture, fruit or seed droppings. Plantings and structures shall be located with due regard to traffic safety and effective mechanical snow removal.

It must also accomplish the following objectives:

Sec. 59-E-4.2. Parking facilities plan objectives.

A parking facility plan shall accomplish the following objectives:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.*
- (b) The safety of pedestrians and motorists within a parking facility.*
- (c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.*
- (d) The provision of appropriate lighting, if the parking is to be used after dark.*

Sec. 59-E-4.3. Required provisions.

In order to accomplish the above objectives, the parking facility plan shall satisfy the following requirements:

- (a) Effective landscaping of parking lots contiguous to or adjacent to any public road shall be provided in accordance with the landscaping requirements of section 59-E-2.7.*

- (b) Safe sight distances free of any obstruction shall be provided at all entrances and exits to public roads. Ample safe sight distances clear of any building or other artificial or natural obstructions shall be provided at the corner of intersecting public roads.*
- (c) Effective channelization and division of parking areas within the interior of a parking facility shall be provided for both pedestrian and vehicular traffic. This may be accomplished by use of landscaped areas with trees, walls, fences, other natural growths or artificial features, raised curbs, marked directional lanes and controls, change of grade or other devices to mark points of turn, to separate parking areas and to control traffic movement.*
- (d) Parking facilities containing 500 or more parking spaces shall be divided into several smaller parking areas and shall be separated from each other by landscaping, change of grades, buildings or other natural or artificial means.*
- (e) Each parking facility shall be designed individually with reference to the size, street pattern, adjacent properties, buildings and other improvements in the general neighborhood, number of cars to be accommodated, hours of operation and kinds of use.*

Technical Staff concluded that the proposed parking meets the parking facilities plan objectives of *Section 59-E-4.2*, for the following reasons:

Adjacent properties are reasonably protected from automobile noise, glare, lights, parking lot lighting and automobile fumes because of the topography of the site (sloping towards Rockville Pike), and the extensive landscaping and trees that exist on the site. Pedestrians and motorists will be able to access the building safely from the parking garage or the outdoor parking areas because there are sufficient drive aisle widths on the property, as well as current and planned sidewalks. Motorists will be able to maneuver onto the site and exit the site safely, and the existing gated entrance at the rear of the property will limit the number of vehicles that can enter and exit the property from Alta Vista Terrace. Finally, FASEB will not typically operate after daylight hours; however, lighting is proposed for the parking areas, and it will be consistent with existing lighting on the property that is angled down to reduce glare while providing safety for pedestrians.

Perhaps even more important is the uncontroverted testimony at the hearing that during the peak hours of occupation on campus, a large portion of the parking spaces on the FASEB campus (197 of 434) were found to be vacant during a recent survey. Tr. 44-45.

In addition, Technical Staff has a chart which demonstrates

Petitioner's compliance with Code §59-E-2.83, which provides the requirements for setbacks and screening for parking and loading facilities in residential zones.

Table 2. Parking Facility Spaces and Setbacks:

Item	Required/Allowed	Proposed
Yard Requirements for Parking and Loading Facility	Parking and Loading facilities for special exception uses in residential zones (59-E-2.83) requires each parking and loading facility, including each exit and entrance driveway, be setback at a distance not less than the applicable building front and rear yard and twice the building side yard required in the zone.	
Front- Rockville Pike Side- Rear-	25 ft. 16 ft. (2 x 8') 20'	27' 25' 30'
Screening and Shading	6 ft.	Significant screening and shading is provided higher than the required 6 ft.

Traffic circulation, landscaping, safety and the other objectives and requirements have already been discussed in this report, and both Technical Staff and the Hearing Examiner have concluded that they meet the specified criteria. The Hearing Examiner concludes that, if the Board grants the requested waiver of the Code §59-E-3.7 parking standards discussed above, Petitioner meets the Parking requirements of Article 59-E.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) Rifle, pistol and skeet-shooting range, outdoor.
 - (2) Sand, gravel or clay pits, rock or stone quarries.
 - (3) Sawmill.
 - (4) Cemetery, animal.

(5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*

(6) *Riding stables.*

(7) *Heliport and helistop.*

Conclusion: The minimum lot width at the street line (Rockville Pike) is 25 feet in the R-60 Zone. The subject lot is 110.5 feet in width at the street line.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: As stated in Part II.E. of this report, Environmental Planning Division granted Petitioner an exemption from the Forest Conservation Requirements of Chapter 22A (Exhibit 10).

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: A Preliminary Storm Water Management Concept Plan has been approved by the Department of Permitting Services (DPS). Tr. 97. Petitioner's engineering expert, Stephen Crum, testified that Petitioner will be providing both quantity and quality management for the new structure, and that will be an improvement to the environment over the existing conditions, "in that the Lee building's roof water currently runs off without any storm water management controls." Tr. 97. The new storm water management facility will be designed to the new State of Maryland criteria that went into effect two years ago. Technical Staff and the Hearing Examiner have recommended a condition that the final Stormwater Management (SWM) and Sediment and Erosion Control plans be approved by the Department of Permitting Services, and be consistent with the final Tree Save Plan. The Hearing Examiner concludes that the special

exception sought in this case would be consistent with the approved preliminary water quality plan.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner has not requested authorization to place any signs.

- (g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The compatibility of the proposed structures with their surroundings is discussed above in connection with the requirements of Zoning Ordinance Sections 59-G-1.21(a)(4) and 59-G-2.19(a)(2). The Hearing Examiner concludes that the structures planned in this case will be compatible, to the extent they are visible from outside the campus.

- (h) **Lighting in residential zones.** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Petitioner's photometric studies of both the current lighting and the planned new lighting (Exhibits 5(c) and (d)) demonstrate that Petitioner's lighting will be in compliance with the statute. Technical Staff reviewed these findings and also found that "[t]he proposed lighting for the building and the parking garage are consistent with the previously approved lighting, and given the topographical conditions, lighting from the parking garage and the buildings will not impact adjoining properties." The Hearing Examiner concurs in concluding that neither the current FASEB lighting, nor the planned additional lighting, will adversely affect the neighborhood.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the changes proposed by Petitioner meet the specific

and general requirements for the proposed use, and that the Modification Petitions and requested parking standards waiver should be granted, with the conditions recommended in the final section of this report.

Petitioner has also requested that the Board's approval of Phase 3 have a 12 year duration. For the reasons discussed on pages 16-17 of this report, the Hearing Examiner cannot agree. Instead, the Hearing Examiner recommends approval of the Phase 3 special exception modifications for the normal 24 month statutory period specified in Zoning Ordinance §59-A-4.53(b), with Petitioner retaining the right under Zoning Code §59-A-4.53(c) to seek one year extensions of the approval for Phase 3, assuming it is not commenced within 24 months after approval.

F. The Requested Variances

Both the proposed Phase 2 building and the proposed Phase 3 building expansion will require a 22 foot height variance from the 35 foot height limit under Zoning Code §59-C-1.327(a). This is the result of the steep slope of the terrain, even though the new buildings will be shorter than the existing Lee Building. The parking structure will require two different sideyard setback variances. The first variance of 1.92 feet occurs in Phase 2 even though the garage will not be enlarged in Phase 2, because the garage will become an accessory structure, by definition, once it is detached from the existing building. Petitioner needs a 31.92 foot side yard setback variance for the garage in Phase 3 even though it will get no closer to the property line because the 60 foot addition to its length adds to the size of the statutorily prescribed sideyard setback under Zoning Code §59-C-1.326(a)(2)(C)(4).

For the reasons set forth in Part II. H. of this report, the Hearing Examiner concludes that Petitioner has satisfied the requirements for the area variances it requests, with regard to both height and setbacks. Therefore, the variances should be granted in the amounts requested.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petitions numbered S-862-B and A-6008, which seek to modify an existing special for a private educational institution operated by Federation of American Societies for Experimental Biology (FASEB), at 9650 Wisconsin Avenue (a/k/a Rockville Pike and MD Route 355), Bethesda, Maryland, and to obtain a variance from both height and setback restrictions in the Zoning Ordinance, and for a waiver of the parking standards of Section 59-E-3.7 of the Zoning Ordinance to allow a maximum of 700 employees after it completes its Phase 3 construction of a parking garage extension, be **granted** with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.

2. All terms and conditions of the approved special exceptions shall remain in full force and effect, except as modified by the Board as a result of these Modification Petitions.
3. Petitioner shall conform with Chapter 50 (Subdivision Regulations) of the County Code.
4. Petitioner shall comply with Local Area Transportation Review requirements, as follows:
 - a. Limit the development to an expansion of existing office building to an additional 40,000 square feet of office use for a total of 207,312 square feet, that includes a previously approved 50,000 square feet of office.
 - b. Install three additional bus shelters along northbound Rockville Pike (MD 355) in the vicinity of the campus or other locations in the Bethesda-Chevy Chase area, for a total of four shelters. The three new bus shelters are required to mitigate the additional one and two CLVs in the morning and evening peak hours, respectively, at the intersection of MD 355 and Cedar Lane, which will likely result from the proposed new office space and additional employees during Phase 3. The bus stops on Rockville Pike and other nearby locations should conform to the requirements of the Montgomery County Department of Public Works and Transportation (DPWT).
 - c. Continue use of the Transportation Management Plan (Exhibit 9(a)).
5. Petitioner shall comply with Chapter 22A (Forest Conservation), as follows:
 - a. A final Tree Save Plan (FCP) shall be submitted to M-NCPPC prior to DPS approval of the sediment and erosion control plan or any clearing, grading or land disturbance on site.
 - b. The final Stormwater Management (SWM) and Sediment and Erosion Control plans shall be approved by the Department of Permitting Services, and be consistent with the final Tree Save Plan. Full water quality and quantity control shall be expected to protect the integrity of the Lower Rock Creek watershed.
 - c. The Tree Save Plan shall address all of the following issues before approval will be granted:
 - 1) A detailed Tree Save Plan shall be prepared by an ISA certified arborist and shall include the delineation and determination of significant impacts (>30%) to the critical root zones of all trees over 24" dbh that will be impacted by construction activities.
 - 2) Mitigation may be required for any specimen trees, if encroachment on the critical root zone of 30% or more is avoidable. Mitigation may be required for the removal of specimen trees up to a rate of 2:1 on an inch-per-inch basis. Potential planting areas shall be shown on the FCP.

6. Petitioner shall not exceed the 580 employees approved in S-862-A unless and until it has completed construction of the garage extension planned for Phase 3 and opened it for use, in accordance with the waiver of parking standards, hereby approved pursuant to Zoning Ordinance §59-E-4.5, which permits it to have fewer than the number of parking spaces required in §59-E-3.7. After the garage extension becomes operational, Petitioner shall not exceed 700 employees.
7. In light of the anticipated increase in the number of FASEB employees, the Transportation Coordinator under the Transportation Management Plan shall report any instances of queuing on public streets awaiting entry to the FASEB campus or reports of parking on public streets by FASEB employees in his/her annual report to the Board of Appeals. If the Board determines that the increase in FASEB employees is creating an adverse condition on the nearby public streets, it may revoke the waiver of parking standards, in whole or in part, or require FASEB to otherwise remedy the problem.
8. All special exception modifications are approved for the normal 24 month statutory period specified in Zoning Ordinance §59-A-4.53(b), with Petitioner retaining the right under Zoning Code §59-A-4.53(c) to seek one year extensions of such approvals, if implementation is not commenced within 24 months after approval.

Dated: January 25, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner

**HEARING EXAMINER'S SUPPLEMENTAL REPORT AND
RECOMMENDATION**

I. BACKGROUND OF REMAND ORDER AND RECENT DEVELOPMENTS

On June 18, 2004, Petitioner, Federation of American Societies for Experimental Biology (FASEB), filed Petition # S-862-B for modification to an existing Private Educational Institution special exception. Petitioner simultaneously applied for height and setback variances in Petition # A-6008. A public hearing was held on November 19, 2004, and the record was subsequently reopened at Petitioner's request so that Petitioner could seek a parking waiver pursuant to Zoning Ordinance §59-E-4.5. The record closed on January 24, 2005, and the Hearing Examiner's report was submitted to the Board of Appeals (the "Board") on January 25, 2005.

On March 17, 2005, the Board of Appeals remanded FASEB's petition to the Hearing Examiner to obtain additional information on the following questions (Exhibit 36):

1. How much space will be leased for the non-profit incubator?
2. How many employees are anticipated for the incubator?
3. What is the anticipated traffic impact of the non-profit incubator? And
4. What is the relevant case law or legal standard to explain why Policy Area Transportation Review (PATR) should or should not apply?

The Hearing Examiner concluded that these questions raised a few other questions:

5. Were the additional employees to be generated by the non-profit incubator included by Petitioner in its figure of a maximum of 700 employees on site?
6. What is the legal basis (and/or precedent in Planning Board practice) for Petitioner's expert (Kevin D. Sitzman's) testimony (Tr. 124) that the appropriate staging ceiling is 390 jobs because that was the figure in effect prior to the filing date of this Petition on June 18, 2004, rather than the June 30 staging ceiling quoted in Technical Staff's report?
7. Do Petitioner's proposed traffic mitigation measures satisfy the PATR requirements, if they are applied in this case, and if so, how? And
8. What impact, if any, does FASEB's report to the Board of January 24, 2005, which was not in the record before the Hearing Examiner but which the Board considered at its February 16, 2005 Worksession along with the Hearing Examiner's report, have on any of these issues?

On March 22, 2005, the Hearing Examiner issued a notice (Exhibit 37) to the parties and to the relevant citizen's associations and government agencies, advising them of the remand and directing Petitioner and Technical Staff to file responses to these questions by April 1, 2005. On March 28, 2005, Petitioner filed its response to the listed questions (Exhibit 38), and on April 7, 2005, Technical Staff issued its responsive memorandum (Exhibit 39). The record was held open until April 11, 2005 for any further public comments, but nothing further was received.

The Hearing Examiner finds that no additional hearing is needed to respond to the Board's remand questions, and those questions are addressed in Part II, below.

II. THE BOARD'S QUESTIONS

Set forth below are the Board's and the Hearing Examiner's questions, followed by the responses by Petitioner and Technical Staff, and a finding on each question by the Hearing Examiner. It should be noted at the outset, however, that the issue raised by the Board in question 4, regarding Policy Area Transportation Review (PATR), has been, to some extent, mooted by Technical Staff's belated determination that "[a]n amendment to a previously approved Preliminary Plan of Subdivision is required in this case, and the Planning Board will make a determination of adequate public facilities for the revision of the preliminary plan after approval of the subject special exception petition." Exhibit 39, page 2.

Pursuant to Zoning Ordinance §59-G-1.21(a)(9)(i), the Planning Board and not the Board of Appeals, is the final arbiter as to the adequacy of public facilities in cases where subdivision review will be required. As stated in the Code:

If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.

Therefore, the Hearing Examiner recommends, in Part III of this supplemental report, that the requirement of "subdivision approval," as specified by the Zoning Ordinance, be added as a ninth condition.

However, the fact that the Planning Board conducts a detailed review of public facilities at subdivision does not obviate the Board of Appeal's obligation to consider traffic and other demands on public facilities which will be generated by any petitioner, insofar as such effects impact upon compatibility and the public interest. Thus, where, as here, there is evidence regarding traffic issues, the Board of Appeals should take that evidence into account in determining whether the Petitioner will create non-inherent effects (or combined inherent and non-inherent effects) that will adversely impact neighbors.

Those issues were, in fact, discussed in the Hearing Examiner's original report (pages 19-24, 49-50 and 56), wherein the following conclusion was reached:

The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. There is ample evidence in the record proving the adequacy of public facilities. Transportation facilities are discussed in Part II. F. of this Report, where we concluded that both LATR and PATR have been satisfied. Petitioner's engineering expert, Stephen Crum, testified to the adequacy of water and sewer services (Tr. 92).

Transportation Planning Staff found that the proposed changes, in combination with the recommended conditions “will not have an adverse effect on area roadway conditions.” Moreover, as noted by Technical Staff, traffic reduction measures are in place at the rear entrance on Alta Vista Terrace that have improved, and will continue to improve, safety of vehicular and pedestrian traffic. The Transportation Management Plan (Exhibit 9(a)) also addresses access, circulation, parking policies, community relations and safety considerations. Tr. 119-120. Based on the evidence in this record, the Hearing Examiner concludes that the proposed modifications, as conditioned, would not create a significant adverse traffic impact, nor reduce the safety of pedestrian or vehicular traffic.

We now turn to the questions posed by the Board and the Hearing Examiner. As to each question, the responses of the Petitioner and the Technical Staff are quoted, and then followed by the Hearing Examiner’s findings.

Question 1.

How much space will be leased for the non-profit incubator?

Petitioner’s Response: Not to exceed 17,800 square feet.

Technical Staff Response: The petitioner states that the space to be leased for the non-profit incubator will not exceed 17,800 sq. ft. The proposed non-profit incubator space will not increase the overall size of the proposal and therefore does not conflict with the previous Planning Board approval for 207,312 square feet of development for case number S-862B.

Hearing Examiner’s Finding: The non-profit incubator will require up to 17,800 square feet of floor space, but will not increase the overall floor space requested by Petitioner and recommended in the Hearing Examiner’s first report.

Question 2.

How many employees are anticipated for the incubator?

Petitioner’s Response: The existing conditions under which FASEB now operates per the approval of the Board’s Opinion dated December 28, 2001 permit a maximum of 580 employees, which would not change with the proposed renovation in Phase 2. Phase 3 would accommodate an increase of 120 employees for a proposed total of 700 employees. Thus, FASEB is restricted in the number of employees permitted on site, both in Phase 2 and Phase 3, which includes those in the non-profit incubator.

Technical Staff Response: The petitioner states that the maximum number of employees is 700 employees. Technical Staff assumes that the number of incubator space employees (120) will fluctuate given the nature of the intended use, but the number of employees on site will not be more than 700 employees.

Hearing Examiner's Finding: Although Petitioner is apparently unable to answer the question of how many employees are anticipated for the incubator itself, it does specify that the total number of employees, including those in the non-profit incubator, will not, during Phase 2, exceed the 580 presently permitted, and will not, during Phase 3, exceed the 700- employee cap sought by Petitioner. Since it is the total number of employees which affects the impact on the community, the Hearing Examiner is satisfied that Condition Numbered 6, as amended in Part III, below, and Condition numbered 7, recommended in the Hearing Examiner's original report, will appropriately limit the number of employees on campus and monitor traffic problems which might be thereby generated.

Question 3.

What is the anticipated traffic impact of the non-profit incubator?

Petitioner's Response: See Wells and Associates Report marked as Exhibit "A" attached . . . [to Petitioner's response and made a part thereof]. Mr. Sitzman concluded that there is no difference insofar as the traffic impact is concerned between FASEB's employees and those of any non-profit organization.

Technical Staff Response: There will likely be no significant change to site-generated trips due to the conversion of FASEB space for interior non-profit "incubator" space that is anticipated to be provided on the site. The nature of the proposed use is similar to the nature of the existing use and the overall number of employees will not change.

Hearing Examiner's Finding: Based on Mr. Sitzman's study, attached as Exhibit A to Exhibit 38, and Technical Staff opinion that "[t]here will likely be no significant change to site-generated trips due to the conversion of FASEB space for interior non-profit 'incubator' space," the Hearing Examiner so finds.

Question 4. What is the relevant case law or legal standard to Explain Why Policy Area Transportation Review should or should not apply?

Petitioner's Response: We have concluded that case law would support the proposition that whatever policy is in effect when an administrative body acts, that is the policy that would govern unless the change was merely procedural, or if there were specific grandfather provisions in the new policy which would

dictate otherwise. Attached . . . [to Petitioner's response and made a part thereof] is a Memorandum supporting this, marked as Exhibit "B" The Annual Growth Policy that went into effect on July 1, 2004, eliminates the Policy Area Transportation Review (PATR) and reduces the Local Area Transportation Review (LATR), Critical Lane Volume (CLV), standard from 1650 CLV to 1600 CLV in any one intersection. The only intersection which doesn't comply under either CLV standard is Rockville Pike and Cedar Lane. The evidence of record shows that FASEB's recommended traffic mitigation measures (three bus shelters) will reduce FASEB'S CLV at that intersection to or at below the level before any new construction on the FASEB Property. The Hearing Examiner concluded that it is immaterial which standards are applied, since both were satisfied. However, in response to the question posed by the Board, the new policy and standards are applicable, which no longer require a PATR, and the LATR is satisfied by FASEB's traffic mitigation measures.

Technical Staff Response: After the Annual Growth Policy went into effect on July 1, 2004, Technical Staff no longer applies PATR to preliminary plans.

Hearing Examiner's Finding: As noted above, the PATR question has been partially, but not wholly, mooted by Technical Staff's determination that an amended preliminary plan of subdivision would have to be submitted to the Planning Board for approval. The Board of Appeals still has a role to play in analyzing the impact of traffic on the neighborhood, even though the Planning Board has its own statutory role to play in its detailed evaluation of public facilities at subdivision. The question here posed by the Board of Appeals regarding PATR requires analysis of the Council's intent in enacting the change which eliminated the PATR. As stated in *Dyer v. Otis Warren Real Estate Co.*, 371 Md. 576, 581, 810 A.2d 938, 941 (2002),

The "cardinal rule" of statutory construction "is to ascertain and effectuate legislative intent."; " 'To this end, we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also.' " (quoting *Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 128, 756 A.2d 987, 991 (2000)).

Thus, the starting point in our analysis must be the actual language used by the Council regarding the effective date of its changes to the Annual Growth Policy (AGP). The 2003-5 AGP Policy Element provides (Page 2):

AP1 Effective dates

This resolution takes effect on July 1, 2004, and applies to any application for a preliminary plan of subdivision filed on or after that date. Any preliminary plan of subdivision for which a

completed application was filed before July 1, 2004, is subject to all provisions of the previous Annual Growth Policy, as contained in Council Resolution 15-259. All provisions of Resolution 15-529 continue in effect until July 1, 2004. [Emphasis supplied.]

AP2 Previous approvals

If any preliminary plan of subdivision that was approved before July 1, 2004, is either modified or withdrawn and replaced by a new application for a subdivision plan at the same location or part of the same location, the Planning Board when it approves or re-approves a preliminary plan of subdivision after July 1, 2004, must retain any transportation improvement required in the previously approved plan.

It is clear from this language that the new rules apply to a completed preliminary plan of subdivision application filed on or after July 1, 2004. It is also clear that when a subdivision has been approved prior to July 1, 2004, as is the case here, post-July 1, 2004 modifications “*must retain any transportation improvement required in the previously approved plan.*” Unfortunately, it is not entirely clear from the enactment whether the Council intended that the linkage of the effective date to a filing date extend to situations where there is no new subdivision application, and the application under consideration is for a special exception or the modification to a special exception, rather than a subdivision.

Technical Staff’s response does not really answer that question, nor even tell us whether Technical Staff applies the PATR to matters that were filed prior to July 1, 2004, but considered by the Planning Board thereafter. It appears from the record in this case that that is exactly what was done here. The petition was filed on June 18, 2004, but Transportation Planning Staff’s report (attached to Exhibit 18) is dated November 4, 2004, and PATR was considered. Moreover, the Planning Board has actually spoken to this issue (possibly without realizing there was an issue) in the Introduction to the July 1, 2004 LATR Guidelines:

B. Policy Areas

The County is divided into separate traffic zones, which are grouped into policy areas (Map 1). The congestion standards established by the County Council and adopted in these Guidelines are set by policy areas (see Table 1). However, in accordance with the adopted Annual Growth Policy for adequacy of public transportation facilities related to preliminary and project plan applications and all other regulatory actions (i.e., zoning, mandatory referral, and special exception) filed after July 1, 2004, the Planning Board will not be required to determine if sufficient residential or non-residential capacity exists

within the policy area in which a property is located. [Emphasis supplied.]

Thus, it appears that the Planning Board and Technical Staff have linked the application of the new standards to the filing date, not to the date the proceeding is before a decision-making body. As Petitioner correctly points out, the general rule, established by the case law, is exactly the opposite, requiring the court or administrative body to apply the zoning law in effect at the time it is considering the matter, unless the Petitioner has a vested interest that would dictate otherwise or the legislature shows a contrary intent. *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 444, 312 A.2d 225, 247 (1973); *Janda v. General Motors Corporation*, 237 Md. 161, 169; 205 A.2d 228, 233 (1964); and *Yorkdale Corporation v. Powell*, 237 Md. 121, 124-128, 205 A.2d 269, 271-272 (1964).¹²

Interestingly, the Hearing Examiner raised precisely this issue at the hearing, and the following exchange took place: (Tr. 106-108):

MR. SITZMAN: Yes, I'm familiar with the local area transportation review guidelines. The current guidelines went into effect July of this year. FASEB's application was submitted prior to that time so it's governed by the local area transportation review guidelines approved and adopted July of 2002.

MR. GROSSMAN: Why would it not be the current -- the general rule in zoning is that you apply the zoning law that's in effect at the time of the review. If it goes to a court, it's the time the court reviews it. If it's to the Board of Appeals, which will make the decision here, not the planning board, it would be at the time of the Board of Appeals decision. So why would you not be applying the current standards?

MR. SITZMAN: The instructions we received from Park and Planning staff with the update to the local area and transportation review guidelines were that all traffic studies conducted until the July date of the new guidelines July 2004, were to be judged against the congestion standards in the July 2002.

MR. GROSSMAN: Right, and I think that they are doing that. I agree that's what they're doing. I'm not sure they're right about it. I think that, in part, that's based on the fact that many of these that they review come up in the context of preliminary plan of

¹² Petitioner also cites the recent case of *Powell v. Calvert County*, 368 Md. 400, 795 A.2d 96(2002), but that decision dealt more with the question of when a Petitioner obtains a vested interest, and there is no claim of a vested interest in this case.

subdivision, which is a planning board public facilities' decision, not a Board of Appeals zoning decision, which this one is.

So, I just wonder and I'll ask counsel this question, in your opinion, shouldn't we be applying the current July 1, 2004 standards?

MS. MARTIN: The transportation staff at Park and Planning, specifically noted that they recognized it was filed prior to July 1st and they applied that. But, as far as the mitigation standards, I can assure you they applied that the mitigation would be in both scenarios.

MR. GROSSMAN: No, I'm talking a legal issue. What I'm suggesting is maybe the transportation staff is wrong in which standard they applied and that's why I'm asking you, shouldn't we be applying the July 1, 2004 standards, given the general rule that you apply the zoning law at the time the body reviewing it makes the decision?

MR. METZ: If I could?

MR. GROSSMAN: Mr. Metz, sure.

MR. METZ: In general practice, in Montgomery County, when a deadline is given in a zoning change or in guidelines and so forth and they say if you filed before a certain date, you apply the old rules. That is common practice and that's why there's a rush for a lot of people to get their application in before that certain date. It's always applied to the older date and if you filed after that date, you always apply the new date. That happens all the time. That's a standard practice in the County.

MR. GROSSMAN: Well, all right, accepting that, I've seen the case law in the County or in the State of Maryland, at least, that says that you apply the zoning law in effect at the time you make the zoning decision, not the previous one, not the date of application, unless there's been a vested interest developed in the course of the application process and there are certain standards for when that vesting occurs.

MR. METZ: That's right about the vested right, but, however, when there's a certain date set forth in the change, I think the standard practice is followed, that the date is the cutoff. If you filed before that date, then you apply under the old rules.

The Hearing Examiner finds that Mr. Metz was quite correct in relating what the practice has been in Montgomery County, just as he was also

correct in the legal analysis he submitted (Exhibit B) which sets forth the general proposition for determining which law to apply, the pre or post July 1, 2004 standards. Nevertheless, the final resolution of this issue depends on an interpretation of the Council's intent, as recognized in the above-cited case law.

The Hearing Examiner finds that the Council's language, pinning the effective date of the PATR/LATR changes to the filing of an application for a preliminary plan of subdivision, was an indication that the Council intended to link the effective date of the change to the date of filing of all related types of applications, such as special exceptions. Not only did the Planning Board reach the same conclusion, as evidenced by the above-quoted language in the 2004 LATR Guidelines, but it is also a sensible approach since Zoning Ordinance §59-G-1.21(a)(9)(i) makes the determination of adequate public facilities a Board of Appeals responsibility when a special exception application is filed and subdivision is not required. Thus, whether or not subdivision is required, an Applicant would know which public facilities standards applied to its application. The Hearing Examiner concludes that the Council intended this sensible approach, rather than the general case law rule, which would have applied, absent any indicia of the Council's intent.

This issue, of course, is not only partially mooted in the case at bar based on Technical Staff's determination that an amended plan of subdivision will have to be filed, it is also disappearing in general, as there are fewer and fewer cases left that were filed prior to July 1, 2004. The "bottom line" in the subject case is, as the Hearing Examiner noted in his original report – whether or not one applies PATR, the Petitioner appears to have satisfied it here with its planned mitigation methods.

Question 5.

Were the additional employees to be generated by the non-profit incubator included by the Petitioner in its figure of a maximum of 700 employees on site?

Petitioner's Response: Yes.

Technical Staff Response: Yes – Technical Staff agrees with the applicant response.

Technical Staff agrees with the petitioner's answer that the total number of employees on site, including those anticipated by the incubator, will not exceed 700 employees.

Hearing Examiner's Finding: Petitioner and Technical Staff agree that the 700-employee figure includes employees generated by the non-profit incubator. There is no evidence to the contrary, and Petitioner is clearly willing to be held to that limit. Therefore, the Hearing Examiner recommends,

in Part III, below, that its previously recommended Condition 6 be amended by adding the following sentence: "All caps on the numbers of employees include employees and other staff of the proposed non-profit incubator, as well as Petitioner's own employees and staff."

Question 6.

What is the legal basis (and/or precedent in Planning Board practice) for Petitioner's expert (Kevin D. Sitzman's) testimony (Tr. 124) that the appropriate staging ceiling is 390 jobs because that was the figure in effect prior to the filing date of this Petition on June 18, 2004, rather than the June 30 staging ceiling quoted in Technical Staff's report?

Petitioner's Response: The question is not relevant since the new Policy eliminates the requirement for PATR.

Technical Staff Response: Technical Staff provided the applicant with a scoping memorandum in February of 2004 that stated there was capacity for 390 jobs in the Bethesda/Chevy Chase policy area. The applicant submitted their Local Area Transportation Review (LATR) in April of 2004 and cited the 390-job figure. However, between the time that the applicant received the scoping memorandum in February and the time of LATR submission in April, the job figure had changed to 57 jobs. Technical Staff cited this 57-job figure for informational purposes and it did not change between April and June of 2004. The Planning Board will review the project for the provision of public facilities when the applicant returns to the Planning Board with an application for an amendment to their previously approved Preliminary Plan of Subdivision (#1-02079).

Hearing Examiner's Finding: Neither the Petitioner nor the Technical Staff answered the question completely; however, this question was posed by the Hearing Examiner, not the Board, and the Hearing Examiner does not find it necessary to obtain the answer in view of his finding that Petitioner's traffic-impact mitigation measures have satisfied any PATR issues that were raised. Moreover, based on Technical Staff's determination that the Planning Board will require an amended subdivision plan, it is apparent that that Board will be re-reviewing the burden on public facilities at a later date.

Question 7.

Do Petitioner's proposed traffic mitigation measures satisfy the PATR requirements, if they are applied in this case, and if so, how?

Petitioner's Response: The question is not relevant since the new Policy eliminates the

requirement for PATR. However, as noted by Mr. Sitzman and the Transportation Staff at the Maryland —National Capital Park and Planning Commission (“M-NCPPC”), the Petitioner’s proposal satisfies LATR.

Technical Staff Response: PATR requirements are not required, and the Planning Board will review the project for the adequate provision of public facilities when the applicant returns to the Planning Board with an application for an amendment to their previously approved Preliminary Plan of Subdivision (#1-02079).

Hearing Examiner’s Finding: Both Technical Staff and Petitioner state that PATR is not required. Applying the logic of the Hearing Examiner’s response to Question #4, it appears that PATR does apply to the public facilities question to the extent the Board of Appeals considers it in determining compatibility and the public interest. Although the answers provided by Petitioner and Technical Staff fail to flesh out the particulars of how PATR was satisfied, the Hearing Examiner finds that there was adequate evidence in the hearing and in the Technical Staff report to conclude that Petitioner’s mitigation efforts were sufficient to satisfy PATR.

Question 8.

What impact, if any, does FASEB’s report to the Board of January 24, 2005, which was not in the record before the Hearing Examiner but which the Board considered at it’s February 19, 2005 Work Session along with the Hearing Examiner’s report, have on any of these issues?

Petitioner’s Response: The January 24, 2005 Annual Report is a requirement of the underlying Special Exception. The Board opens the record and enters it into the record, and thus anything contained in that report can be considered by the Board. That report, however, has no impact on the issues pending by this Modification Petition.

Technical Staff Response: FASEB’s report dated January 25, 2005 describes FASEB’s implementation of their Transportation Management Plan. The report shows that FASEB is meeting the condition of their previous special exception approval and actively working to address the concerns of the Maplewood Citizen’s Association, e.g. controlling access and parking on the FASEB site and mitigating trips.

Hearing Examiner’s Finding: The Hearing Examiner finds that the FASEB report to the Board of January 24, 2005, has no impact on the issues raised in this remand because it deals with issues of past performance under the Transportation Management Plan (which appears to be functioning well, in any event), not with the issues of the future impact of the non-profit incubator and the application of the PATR.

III. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petitions numbered S-862-B and A-6008, which seek to modify an existing special for a private educational institution operated by Federation of American Societies for Experimental Biology (FASEB), at 9650 Wisconsin Avenue (a/k/a Rockville Pike and MD Route 355), Bethesda, Maryland, and to obtain a variance from both height and setback restrictions in the Zoning Ordinance, and for a waiver of the parking standards of Section 59-E-3.7 of the Zoning Ordinance to allow a maximum of 700 employees after Petitioner completes its Phase 3 construction of a parking garage extension, be **granted**, with the conditions specified in my initial report and recommendation, plus the following amended condition 6 and additional condition 9:

Amended 6. Petitioner shall not exceed the 580 employees approved in S-862-A unless and until it has completed construction of the garage extension planned for Phase 3 and opened it for use, in accordance with the waiver of parking standards, hereby approved pursuant to Zoning Ordinance §59-E-4.5, which permits it to have fewer than the number of parking spaces required in §59-E-3.7. After the garage extension becomes operational, Petitioner shall not exceed 700 employees. All caps on the numbers of employees include employees and other staff of the proposed non-profit incubator, as well as Petitioner's own employees and staff.

9. Petitioner must obtain subdivision approval as a condition of the Board's approval of this special exception amendment.

Dated: April 27, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner